

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
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IN THE MATTER OF:
BRANDYWINE SENIOR LIVING
AT POTOMAC, LLC

Applicant

Brenda Bacon

Hal Bolton

Josh Sloan

Donald Mitchell

Anne (Nancy) Randall

Donald Boucher

Scott Harvey

For the Application

Erin E. Girard, Esquire

Stephen Kaufman, Esquire

Attorneys for the Applicant

Benjamin Berbert, Technical Staff of the

Planning Department

Called as a Witness by the Pauls' Attorney *

Curt Uhre, individually and on behalf of

the Brickyard Coalition

Ted Duncan, President of the Brickyard

Coalition

Dr. Ronald A. Paul

Mrs. Toni Paul

Ronald Danielian

Gerald Henning

James Noonan

William J. Chen, Jr., Esquire

Attorney for Dr. and Mrs. Paul

Susanne Lee, President, West Montgomery

County Citizens Association (WMCCA)

Opposing the Application

Before: Martin L. Grossman, Hearing Examiner

Director, Office of Zoning and Administrative Hearings

OZAH Case No. CU 16-01

HEARING EXAMINER'S REPORT AND DECISION

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I. STATEMENT OF THE CASE AND DESCRIPTION OF PROCEEDINGS

On July 9, 2015, Brandywine Senior Living at Potomac, LLC (hereinafter, Applicant or Brandywine), filed an application seeking a conditional use for a Residential Care Facility consisting of 140 beds for seniors needing assisted living and/or memory care. Exhibit 1. The subject site is a 4.02 acre property, identified as Parcel A of the Potomac Tennis Club, located at 10800 Potomac Tennis Lane, approximately 600 feet north of the intersection with MD 189 (Falls Road) in Potomac, Maryland. The site is in the RE-2 Zone, and is subject to the Potomac Subregion Master Plan, approved and adopted in April 2002. It is owned by Potomac Sports, Inc., which has authorized the conditional use application. Exhibits 6 and 83.

The conditional use is sought pursuant to Section 59.3.3.2.E.2.c. of the Zoning Ordinance.¹ By Notice issued on July 16, 2015, the Office of Zoning and Administrative Hearings (OZAH) scheduled a public hearing to be held on November 6, 2015. Exhibit 34.

Two prehearing letters of support for the application were filed – one by Michael Marchitto, Jr., Director of Economic Development for Voorhees Township, New Jersey (Exhibit 53) and the other by Cary Prokos, proprietor of nearby Normandie Farm Restaurant (Exhibit 81(c)). Four additional letters of support were filed during the hearing (Exhibit 89(a) – (d)).

Prehearing letters of opposition from the community were filed by Nancy Holahan (Exhibit 40); Mr. Curt Uhre on behalf of the Brickyard Coalition (Exhibits 44 and 69); Dr. and Mrs. Ronald Paul (Exhibits 46 and 70); Judith Braslow (Exhibit 48); Alexandra Arata (Exhibit 51); Kenneth Gross (Exhibit 67); Drs. Robert and Linda Stillman (Exhibit 68); Kenneth Marcus (Exhibit 81(b)); and Julie and Ken Lieu (Exhibit 82). On November 13, 2015, after the first

¹ All citations in this Decision are to the 2014 Zoning Ordinance for Montgomery County, adopted September 30, 2014 (Ordinance No. 17-52), as amended effective December 25, 2015, in ZTA 15-09 (Ordinance No. 18-08, adopted December 1, 2015).

hearing date, Susanne Lee, President of the West Montgomery County Citizens Association (WMCCA) filed a statement in opposition (Exhibit 96). On the third day of the hearing (December 7, 2015), Mr. Uhre submitted a petition in opposition with approximately 130 signatures from people with addresses listed throughout the county (Exhibit 119).

On September 18, 2015, the Applicant filed a motion to amend the application with revised plans and statements. Exhibits 39 and 39(a)-39(m). A notice of the motion to amend was issued on September 23, 2015. Exhibit 43. Objections to the Motion to Amend were filed by Mr. Uhre, individually (Exhibit 55) and by William J. Chen, Jr., Esquire, who entered his appearance on behalf of Dr. and Mrs. Paul, abutting neighbors of the subject site. Exhibit 57. Mr. Uhre's letter also raised a concern about traffic accident data being withheld from him by Technical Staff and asked that the hearing be postponed to give the opposition more time to respond to the amended plans and materials. On October 5, 2015, the Hearing Examiner invited both Technical Staff and the Applicant to respond by October 13, 2015, to the objections raised by Mr. Uhre. Exhibit 56.

Technical Staff responded to Mr. Uhre's allegation by email of October 9, 2015 (Exhibit 58), asserting that the traffic accident data had in fact been released and made public. Applicant's counsel responded on October 13, 2015, with a letter rebutting the opposition's claim of inadequate time to prepare, and noting that Applicant had filed the changed plans seven weeks before the scheduled hearing date. Exhibit 65. On October 15, 2015, the Hearing Examiner issued an Order granting the motion to amend and denying the motion to continue the hearing. Exhibit 66.²

² An additional objection to the amendment was filed on October 15, 2015, by Kenneth Gross (Exhibit 67), but the Hearing Examiner had already granted the motion.

On October 2, 2015, Staff of the Montgomery County Planning Department (Technical Staff or Staff) issued a report, based on the amended plans and submissions, recommending approval of the application, subject to 11 proposed conditions. Exhibit 61. The report contained 21 attachments, including a “Supplemental Staff Response to Community Concerns.” Attachment 17.

The Montgomery County Planning Board (Planning Board) met on October 15, 2015, and unanimously recommended approval of the application, adopting the conditions recommended by Staff, and recommending two additional conditions based on the testimony at its session. Exhibit 74. The two additional conditions require the Applicant to file with the Hearing Examiner the new building elevations that had been presented to the Planning Board and to restrict the hours of delivery and access by trash trucks at the subject site. Technical Staff’s PowerPoint presentation to the Planning Board is in the record as Exhibit 74(a). Critical to the Planning Board’s recommendation were two factors – its finding that “the distance between the Paul’s house and the site, in conjunction with the proposed landscaping was adequate to find this Application visually compatible with the Paul’s property” and its acceptance of Applicant’s offer to provide an employee shuttle to either a local bus stop or to a Metro station, in lieu of providing a new sidewalk for pedestrian access. The Planning Board also approved the Amended Preliminary Forest Conservation Plan (Exhibit 39(g)) at its October 15 meeting, and that approval was formalized in the Board’s Resolution of October 19, 2015 (Exhibit 91).

The Brickyard Coalition filed its prehearing statement on October 19, 2015 (Exhibit 69), and Dr. and Mrs. Paul filed their Prehearing Statement on the same date (Exhibit 70). On October 29, 2015, the Applicant filed signed and sealed copies of their plans (Exhibits 79(a) – (g)), as well as an aerial rendering (Exhibit 79(h)) and an Extended Site Section (Exhibit 79(i)).

The November 6, 2015, public hearing proceeded as scheduled. It began with William Chen, the attorney for the Pauls, objecting to any revisions in the Applicant's plans or the addition of any documents at the hearing, and the Hearing Examiner's ruling that he would make sure that all parties had ample opportunity for commenting on any changes. Tr. 11/6/15, 12-25. Mr. Chen also objected to compatibility being evaluated relative to what is currently on the subject site (a Tennis Club with a large bubble erected part of the year), rather than solely on the merits of the proposed structure, and he made other technical objections. Tr. 11/6/15, 26-40. The Hearing Examiner ultimately ruled that compatibility would be assessed not in comparison with the presently existing use on the subject site but on the merits of the proposed use itself in its relation with the surrounding neighborhood. Tr. 11/6/15, 213-214. The Hearing Examiner differentiated that issue from measuring traffic impacts, which are done on a comparative basis under Local Area Transportation Review (LATR). Tr. 11/6/15, 214. That issue will be further discussed in connection with the discussion of traffic impacts in this Report and Decision.

At the November 6, 2015 hearing, the Applicant called Brenda Bacon, the President and CEO of Brandywine Senior Living, and two expert witnesses, Joshua Sloan, a land planner and landscape architect, and Hal Bolton, an architect. The Applicant also introduced an affidavit of posting (Exhibit 88); some letters of support (Exhibits 89(a) -89(d)); a rendered aerial view of the site (Exhibit 90); the Planning Board Resolution approving the Preliminary Forest Conservation Plan (Exhibit 91); a "turnaround Detail Exhibit (Exhibit 92); the Board of Appeals' Opinion in S-1289 granting a special exception to Manor Care (Exhibit 93); and an un-rendered aerial view of the site (Exhibit 94). The hearing was not completed, and before it resumed, William Chen, the Pauls' attorney, filed a number of photographs (Exhibits 95, 97 and 99) and Susanne Lee filed a Pre-Hearing Statement on behalf of the WMCCA (Exhibit 96). Emails were also exchanged

among the Hearing Examiner, Technical Staff and the Department of permitting Services (DPS) regarding the status of golf ball netting under the Zoning Ordinance, with DPS concluding that golf ball netting was not a fence and DPS does not regulate it (Exhibits 100, 102, and 103).

The hearing resumed on December 3, 2015, and the Applicant called two additional expert witnesses, Donald Mitchell, a civil engineer, and Anne (Nancy) Randall, a transportation planner and traffic engineer. Additional exhibits were introduced, including an aerial photograph showing distances and contour overlays (Exhibit 105); an aerial photograph showing all proposed improvements and a portion of the landscaping (Exhibit 106); a diagram analyzing existing and proposed runoff onto the Paul's property (Exhibit 107); a summary of Ted Duncan's testimony, which was not admitted (Exhibit 108); and the Statement of Susanne Lee, President, West Montgomery County Citizens Association (Exhibit 109). Mr. Duncan and Ms. Lee also testified in opposition.

The hearing resumed again on December 7, 2015, and the opposition introduced testimony from Curtis Uhre, individually and on behalf of the Brickyard Coalition; Dr. and Mrs. Paul; and two experts, Ronald Danielian, a realtor, and James Noonan, a land planner. The opposition also introduced a number of exhibits, including Mr. Uhre's PowerPoint presentation (Exhibit 110); the Planning Department's comments regarding CU 15-06 (Exhibit 111); various photographs (Exhibits 112, 116, 118 and 120); Pages 47, 48 and 62 of the Maryland State Highway Access Manual (Exhibits 113 and 114); Page 17 of the LATR and TPAR Guidelines (Exhibit 115); an email exchange between Mr. Uhre and Technical Staff (Exhibit 117); a petition in opposition with approximately 130 signatures from people with addresses listed throughout the county (Exhibit 119); a portion of Exhibit 92(a) (Exhibit 121); and an enlargement of the western corner of the conditional use plan (Exhibit 122).

Towards the end of the December 7 hearing session, the Hearing Examiner asked the Applicant if it would consider submitting revised plans to improve compatibility with the surrounding neighborhood, including relocating the trash enclosure to the eastern side of the property, moving the stormwater management facility further away from the Pauls' property line and reducing the height of the proposed building on the western end, closest to the Pauls' residence. Tr. 12/7/15 259-260. The Hearing Examiner ordered the Applicant to submit any revised plans to all the parties and Technical Staff for their review and comments, and he scheduled the resumption of the hearing for December 18, 2015. Tr. 12/7/15 272-274.

The Applicant did elect to modify its plans in response to the Hearing Examiner's request, in an effort to improve compatibility, filing the revised plans from December 11 through December 22, 2015 (Exhibits 124, 129, 130, 131 and their subparts). The revised plans proposed moving the trash enclosure 37 feet (but not moving it to the eastern side of the property); moving the stormwater management facility further away from the Pauls' property line; adding a "decorative masonry privacy wall" 15 feet from the western property line; and most importantly, reducing the height of the proposed building on the western end, closest to the Pauls' residence.

On December 15, 2015, the Hearing Examiner issued a notice to all parties and to all entities entitled to receive hearing notices under the Zoning Ordinance, that the hearing session scheduled for December 18, 2015 had been cancelled, and that the next hearing date in this case had been rescheduled to January 15, 2016. This formal notice (Exhibit 128) also advised that, at the request of the Hearing Examiner, the Applicant had submitted revised exhibits showing proposed plan modifications to improve compatibility with the surrounding neighborhood, and that the revised plans would be evaluated at the January 15, 2016 hearing.

During the break between hearing sessions, William Chen, the Pauls' attorney, raised an

issue regarding interpretation of the Zoning Ordinance in light of comments made by the Hearing Examiner at the hearing, and the Hearing Examiner replied, explaining his comments (Exhibits 140-141). The proper application of the Zoning Ordinance to the facts of this case will be discussed in Part III of this Report and Decision.

At the request of the Hearing Examiner, Technical Staff of the Planning Department reviewed the amended plans, and Technical Staff submitted their comments approving the plan revisions to the Hearing Examiner and all parties on January 7, 2016 (Exhibit 133).

The revised plans were discussed at length by various witnesses at the January 15, 2016 hearing. The Applicant recalled Joshua Sloan, Don Mitchell, Hal Bolton and Brenda Bacon, and also called two new witnesses – Donald Boucher, a real estate appraiser, and Scott Harvey, a noise expert. The opposition recalled Ronald Danielian, James Noonan and Dr. Ronald Paul, and also called two new witnesses, Gerald Henning, an acoustical engineer, and Benjamin Berbert, the member of the Planning Department's Technical Staff who evaluated both the original plans and the latest revisions. The Applicant also submitted exhibits showing proposed drainage flow at the southwest apex of the site under the revised plans (Exhibits 129(g), 142 and 142(a)) and photos of trash enclosures at other Brandywine facilities (Exhibits 143(a) and (b)).

After listening to the testimony at the January 15 hearing, the Applicant reluctantly decided to propose a further effort to improve compatibility with the Pauls' residence by moving the trash enclosure to the eastern side of the property (*i.e.*, the area furthest away from the Pauls' property). 1/15/16 Tr. 220-221.

At the conclusion of the hearing, the Hearing Examiner consulted the parties and set the following dates: January 20, 2016, for the Applicant to submit revised plans to the Hearing Examiner, Technical Staff and all parties, relocating the trash enclosure to the eastern side of the

property; February 1, 2016, for comments on the revised plans by Technical Staff and the opposing parties; and February 5, 2016 for any reply from the Applicant and for the final closing of the record. 1/15/16 Tr. 271-273. The record remained open until February 5, 2016, only for the purpose of the Applicant making minor changes in the plans, such as the movement of the trash enclosure location, and for comments thereon. 1/15/16 Tr. 274-275.

The Applicant timely submitted its revised plans on January 20, 2016 (Exhibits 144 and 145, including subparts), and corrected one of the exhibits on January 22, 2016 (Exhibit 147). Technical Staff commented to the Hearing Examiner and all parties on January 29, 2016, approving the plan revisions. Exhibit 149(a). The opposition commented on February 1, 2016 (Exhibits 151 and 152) and on February 5, 2016 (Exhibits 155(a) and 157). On February 5, 2016, the Applicant responded to the opposition's comments. Exhibit 154(a). In addition, on the same day, the Applicant filed a further revised conditional use site plan (Exhibit 153(b)), correcting a textual error that Mr. Uhre had pointed out in his comments. The opposition immediately objected to the filing of a revised conditional use plan without them having the opportunity to comment. Exhibit 156. The Applicant responded, pointing out that the plan revision of February 5, 2016 "only corrected an error in the development table that was identified by Mr. Uhre and had absolutely no impact on site layout or any other characteristic of the Conditional Use." Ex. 158.

The Hearing Examiner responded to this exchange in an email to the parties on February 5, 2016, stating, "While I do not consider most of the opposition's due process objections to be well-founded, I am inclined to keep the record open for another 10 days to allow them time for comment on the newly revised conditional use site plan filed today, even though the changes do not affect the site layout. . . ." Exhibit 159. As promised in that email, the Hearing Examiner issued an Order on February 9, 2016, reopening the record and allowing further comments,

limited as described below. Exhibit 162.

The Hearing Examiner ruled that ample opportunity had already been accorded the parties to address the December 2015 plan changes at the January 15, 2016 hearing, and to comment on the minor change of moving the location of the trash enclosure, which the Applicant agreed to do at the January 15, 2016 hearing and accomplished in the January 20, 2016 plan revisions mentioned above. Thus, the only changes that the opposition could legitimately argue they had not had the opportunity to comment on were the revisions in the February 5, 2016 plan, which do not actually change the site layout. Even though those revisions actually are corrections, not proposed changes to the physical layout, the Hearing Examiner did not want to deprive any party of the opportunity to comment on a plan revision, no matter how minor.

Therefore, his February 9, 2016 Order reopened the record for the purpose of admitting any additional comments the parties wished to make regarding any changes to the Applicant's plans made for the first time on February 5, 2016, in Exhibit 153(b). In addition, in view of objections made by the Pauls to any plan revisions, the Hearing Examiner gave them the opportunity to indicate, while the record was open, whether they would prefer the originally proposed board-on-board fence near the western property line or the "6.5 foot decorative masonry wall" proposed in the December 2015 plan revisions, if the conditional use is granted. Further, given their objections to any plan revisions, the Hearing Examiner asked whether they wished to go back to the original plan for the height of the proposed structure on the western side and to having the trash enclosure on the western side of the building, if the conditional use is granted.

The Order specified that the record would remain open until February 19, 2016, for the limited purpose of receiving these additional comments, if any, and would close again at the close of business on that date.

On February 19, 2016, Mr. Chen, on behalf of the Pauls, and Mr. Uhre both filed further comments (Exhibits 163 and 164). Mr. Chen's submission also attached Exhibit 164(a), a copy of the Landscape and Lighting Details Plan (Exhibit 145(c)), and another affidavit from Dr. Paul (Exhibit 164(b)). The Applicant objected to the breadth of these new filings and asked that they be stricken from the record, asserting that they went far beyond the scope of the commentary permitted by the Hearing Examiner's Order reopening the record. Exhibit 166.

The Hearing Examiner responded to the parties by email, ruling that "the responses of Messrs. Uhre and Chen will not be stricken, but rather will be given such weight in my evaluation as is called for, considering the limits in my order of 2/9/16 reopening the record." Exhibit 167. The record closed, as ordered, on February 19, 2016.

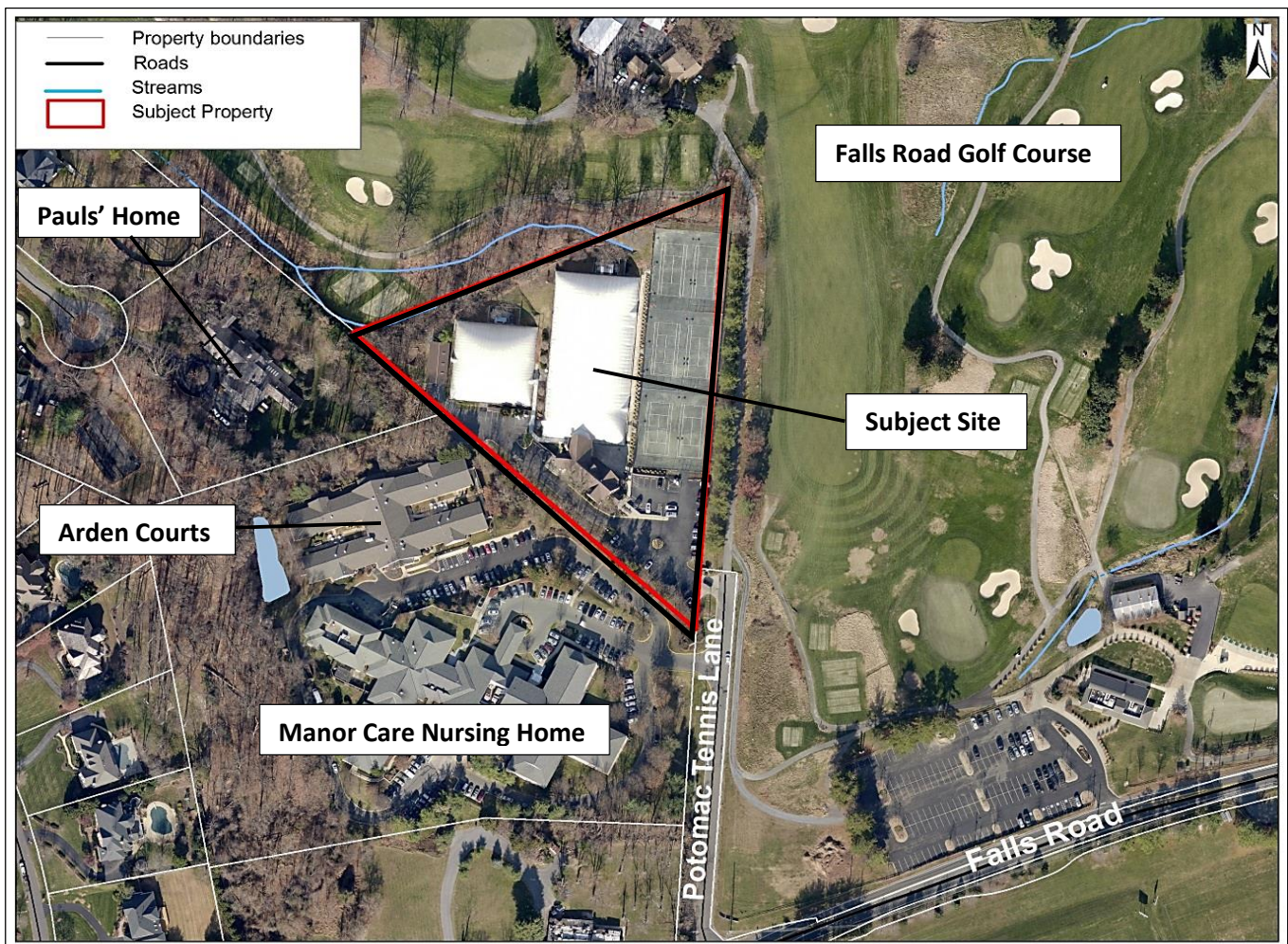
The Hearing Examiner understands the concerns raised by the opposition; however, as will appear more fully below, the Applicant has demonstrated by a preponderance of the evidence, that its proposed use, as represented in the Conditional Use Plan (Exhibit 131(a)) and the other revised plans filed in December of 2015, will meet all the criteria specified in the Zoning Ordinance. More specifically, it will be compatible with the neighborhood; it will be consistent with the goals of the applicable Master Plan; it will not have undue adverse effects on the neighbors; it will be served by adequate public facilities; it will comply with development standards; and it will not harm the environment. Therefore, the Hearing Examiner approves the conditional use application, subject to the conditions listed in Part IV of this Report and Decision.

II. FACTUAL BACKGROUND

A. The Subject Property

As mentioned in the previous section of this report, the subject site consists of 4.02 acres of land, zoned RE-2 and located at 10800 Potomac Tennis Lane in Potomac, Maryland. It is

triangular in shape and is situated at the very end of Potomac Tennis Lane, approximately 600 feet north of its intersection with MD 189 (Falls Road). Immediately to the north and east of the subject property is the Falls Road Golf Course, and immediately to the south of the site are the Arden Courts assisted living facility and the Manor Care of Potomac nursing home. Immediately to the west of the subject site is the residential property owned by Dr. and Mrs. Ronald Paul, who oppose this application. As can be seen on the aerial photo from the Technical Staff report (Exhibit 61, p. 4), displayed below, there are no other immediate neighbors of the subject property:



Technical Staff described the subject site in its report (Exhibit 61, pp. 3 and 6):

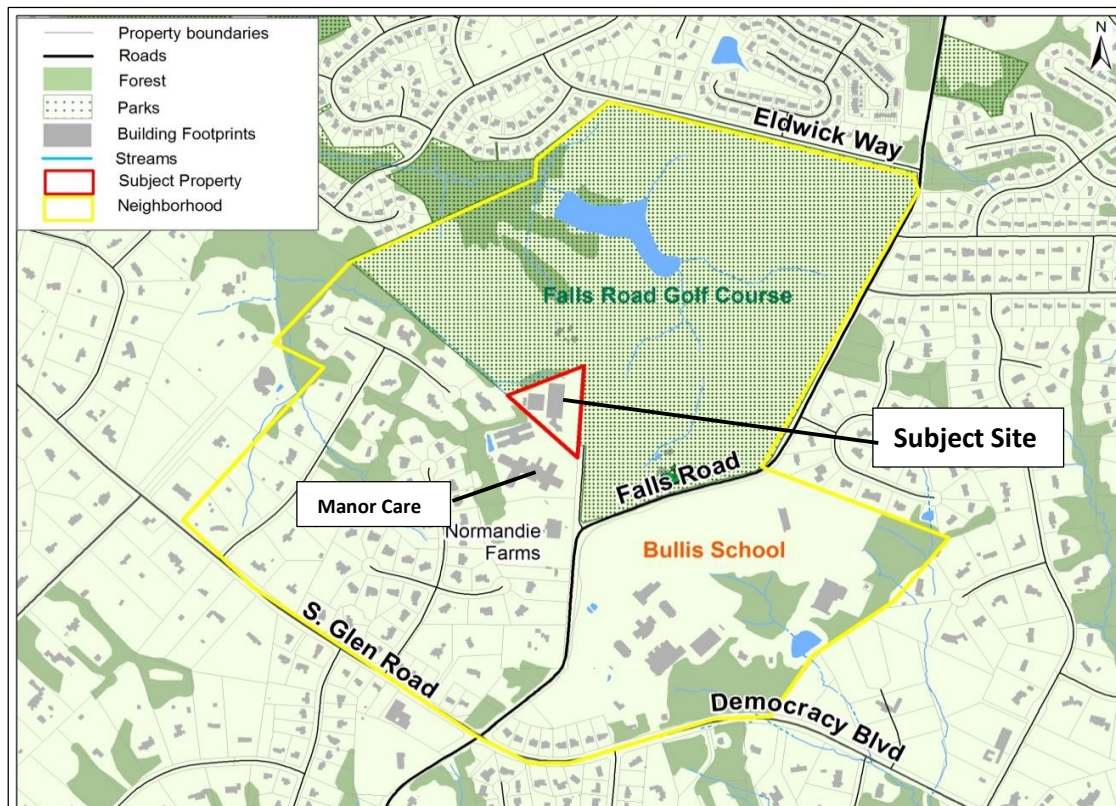
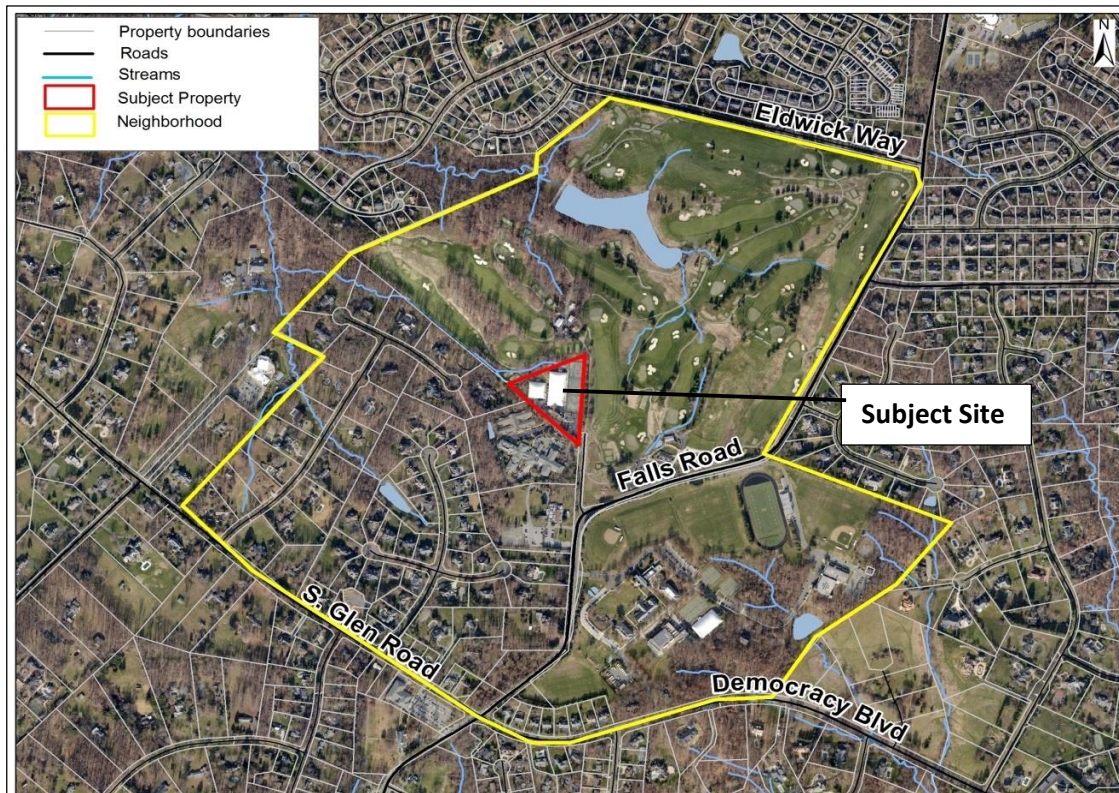
... The Subject Property is already improved with a private tennis club including a clubhouse, [6 open-air tennis courts, 6] tennis courts enclosed in a large white

bubble [during the winter,] a fitness center, a storage shed and 49 surface parking spaces (Attachment 03 [to the Staff Report]). The highest elevation is at the Site's entrance with a terraced elevation drop of about six feet in the middle of the Site and a more substantial elevation drop including an area of up to 25% slopes along the northern edge of the Subject Property. There are no streams or wetlands present, however there is an off-site stream on the property to the north and the associated stream valley buffer extends onto the Subject Property. There are no observed rare, threatened or endangered species on the Site. The Subject Property is located within the Kilgore Branch subwatershed of Watts Branch, a Use I stream. A Natural Resources Inventory/Forest Stand Delineation No. 420151830 (Attachment 04 [to the Staff Report]) was approved for the Site on May 29, 2015 which confirms the existing environmental Site conditions. The existing tennis club improvements have access to Potomac Tennis Lane with a commercial entrance, and the Subject Property has 100 feet of right-of-way frontage. Potomac Tennis Lane is a public street that is approximately 600 feet long and provides the exclusive access to the Subject Property and to the neighboring senior housing property to the south, and provides a maintenance access to the golf course property to the north and east. Potomac Tennis Lane terminates at the Subject Property's frontage to the north and intersects with Falls Road to the south.

B. Surrounding Neighborhood

For the purpose of determining the compatibility of the proposed use, it is necessary to delineate and characterize the "surrounding neighborhood" (*i.e.*, the area that will be most directly impacted by the proposed use). Technical Staff defined the boundaries of the surrounding area as follows: To the north, the neighborhood boundary is the northern property edge of the Falls Road Golf Course along Eldwick Way and the rear of lots in the Bedfordshire Community; to the southwest, the boundary follows the northwestern edge of the Potomac Glen community to South Glen Road; to the south, the boundary is South Glen Road and Democracy Boulevard; and to the east the boundary includes the eastern boundary of the Bullis School (on the east side of Falls Road), and then angles back to follow Falls Road north to Eldwick Way. Exhibit 61, p. 4. The Applicant agreed to this definition of the neighborhood (Tr. 11/6/15, 126-127), and no other party has objected. The Hearing Examiner accepts the proposed definition of the neighborhood, as it includes the area and uses most likely to be affected by the proposed facility.

Technical Staff provided both an aerial photograph and a map showing the proposed boundaries (Exhibit 61, p. 5). They are reproduced below.



Staff described the neighborhood as follows (Exhibit 61, pp. 4-6):

Within the neighborhood there are four properties with existing special exceptions/conditional uses, including the Subject Property. . . . Immediately to the south, Manor Care (1) operates under Special Exception S-1289 which was first approved in March of 1986 and later amended by S-1289A and S-1289B for a 172 bed nursing home and 52 bed assisted living facility [Arden Courts]. The Falls Road Golf Course to the north operates by right, but has approved case CBA-2234 (2) for a radio transmission tower. The Bullis School campus east of Falls Road received their first Special Exception approval CBA-2689 in 1969, and has since been the subject of eight additional Special Exceptions, S-687 and amendments S-687- A thru G that all relate to the continued operation of the private school (3).

* * *

The majority of the neighborhood is comprised of two properties: the Falls Road Golf Course which is a 149 acre property immediately adjacent to the north and east of the Subject Property, and the Bullis School which is a K-12 private education facility located on 100 acres southeast of the Subject Property on the opposite side of Falls Road. The rest of the neighborhood is primarily residential with one-family detached houses in the Potomac Glen and Glen Falls communities located southwest of the Site. Immediately to the south of the Site is a Manor Care elderly care facility and directly south of the Manor Care facility is the Normandie Farms Restaurant and Inn. Almost all of the neighborhood is zoned RE-2 with the exception of the lots directly fronting on South Glen Road and Democracy Boulevard which are zoned R-200, and the Glen Falls community which is RE-2/TDR-1 (Attachment 21[to the Staff Report]).

As previously mentioned, the one home in the neighborhood that is adjacent to the subject site is the property owned by Dr. and Mrs. Ronald Paul, who live just to the west of the subject site. It is approximately 132 feet from the proposed building to the Pauls' property line and approximately 287 feet from the proposed building to the Pauls' home. Exhibit 124(c).

C. Proposed Use

The Applicant seeks a conditional use, pursuant to Section 59.3.3.2.E. of the Zoning Ordinance, to construct and operate a Residential Care Facility consisting of 140 beds in 120 suites, for seniors needing assisted living and/or memory care. The proposed facility would have 135,000 square feet of floor area and a total of 73 parking spaces, consisting of a 55-space

surface lot and an 18-space garage beneath the main structure. The outside of the structure would be designed to have a residential feel, as depicted in the following architect's rendering of the building front (Exhibit 79(f)(i)):



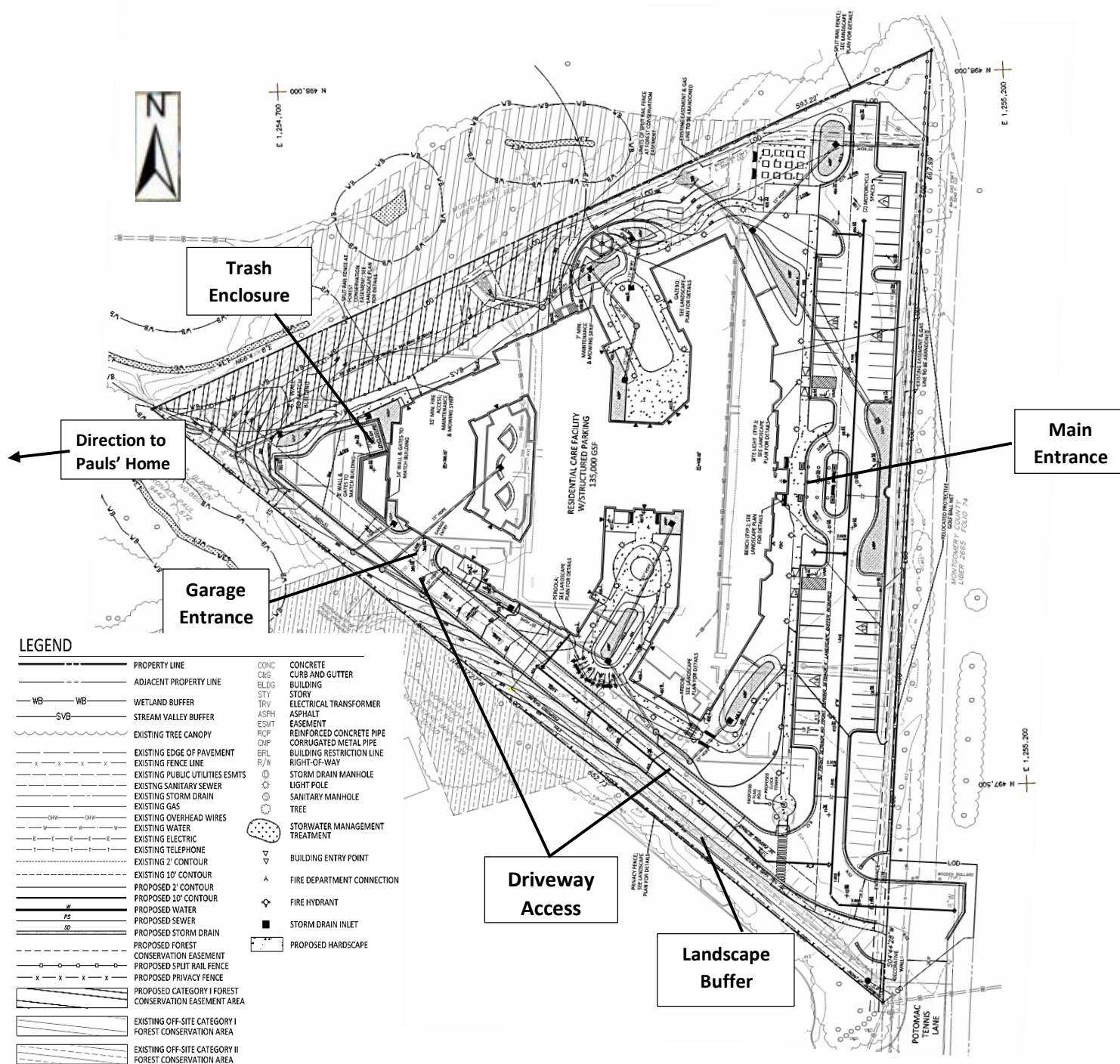
The Applicant also submitted a rendered aerial photo (Exhibit 79(h)) to demonstrate what the facility will look like after construction and with added plantings on the subject site:³



³ The perspective of the rendering is confusing because the Applicant insisted on submitting plans and renderings with north pointing in different directions. The Hearing Examiner finds that that practice leads to confusion, so he has tried to orient all the plans in this report with north towards the top.

1. Site Plan, Elevations and Site Sections

The final approved Conditional Use Site Plan, labelled “Conditional Use Plan” (Exhibit 131(a)), is set forth below and on the following pages. Subsequently proposed Conditional Use Plans (Exhibits 145(a) filed January 20, 2016, and 153(b) filed February 5, 2016) were rejected by the Hearing Examiner for the reasons explained in Part II.E.1. of this Report and Decision.



GENERAL NOTES:

1. THE SUBJECT STUDY AREA IS +/- 4.02 ACRES.
2. THE SUBJECT STUDY AREA IS LOCATED ON WSSC MAP 579.
3. THE SUBJECT STUDY AREA IS LOCATED ON TAX MAP FQ341
4. THE SUBJECT STUDY AREA COMPRISES THE FOLLOWING:

LOT #	BLOCK #	TAX ID #	LIBER& FOLIO
Parcel "A"	N/A	00859586	L. 07190, F. 0759
5. THE SUBJECT STUDY AREA IS ZONED "RE-2".
6. THE VERTICAL DATUM IS BASED ON NGVD29 DATUM.
7. BOUNDARY & TOPOGRAPHIC SURVEY WAS PERFORMED BY VIKA MARYLAND, LLC, MARCH, 2015.

DEVELOPMENT TABULATIONS

Standard Method Development Standards	REQUIRED	PROPOSED
1. Lot and Density - 59-3.3.2.c		
Lot (min)		
Lot area	2.0 Acres	4.02 Acres
	87,120 SF	174,941 SF
RE-2 Zone, Residential Care Facility (over 16 persons)	1,200 sf/bed	1,250 sf/bed
140 Beds	3.86 Acres	4.02 Acres
Lot width at front building line	150'	553'
Lot width at front lot line	25'	100'
Coverage (max)		
Lot	25.0%	25.0%
	43,736 SF	43,736 SF
2. Placement - Principal Building Setbacks - 59-3.3.2		
Front setback	50'	80'
Side street setback, abutting lot fronts on the side street and is in a Residential Detached zone	50'	n/a
Side street setback, abutting lot does not front on the side street or is not in a Residential Detached zone	20'	n/a
Side setback (59-3.3.2.E.2.c.ii.e)	20'	45'
Sum of side setbacks	35'	50'
Rear setback	35'	50'
Accessory Structure Setbacks (min)		
Front setback	80'	80'
Side setback, abutting lot fronts on the side street and is in a Residential Detached zone	50'	n/a
Side street setback, abutting lot does not front on the side street or is not in a Residential Detached zone	20'	n/a
Side setback	15'	n/a
Rear setback, on a corner lot where abutting lot fronts on the side street and is in a Residential Detached zone	12'	n/a
Rear setback, if not otherwise addressed	10'	10'
3. Height (maximum) - 59-4.4.4		
Principal building	50'	50'
Accessory structure	50'	12'
4. Parking - 59-6.2.4.B		
Automobiles		
140 Beds		
0.25/ bed	35	-
40 Employees maximum, at peak shift		
0.5/employee	20	-
totals	55	73
Accessible Parking Spaces (including Van) - 2 standard spaces in garage	4	4
Van Accessible Parking Spaces	1	2
Motorcycle Spaces - 2% of provided Automobile Spaces (10 max)	2	2
Bicycle Spaces (no dwelling units) - provided within garage	0	10
Long-term Bicycle Spaces (95% of Bicycle spaces, rounded up)	0	0
5. Parking setbacks- Conditional Uses - 59-6.2.5.K.2		
a. Rear parking setback (same as rear setback req'd for sfd)	35'	35'
b. Side parking setback (2 times min side setback req'd for sfd)	34'	n/a
6. Loading - 59-6.2.8.B		
25,001 sf - 250,000 sf: 1 loading space	1	1

E;
E
ILS

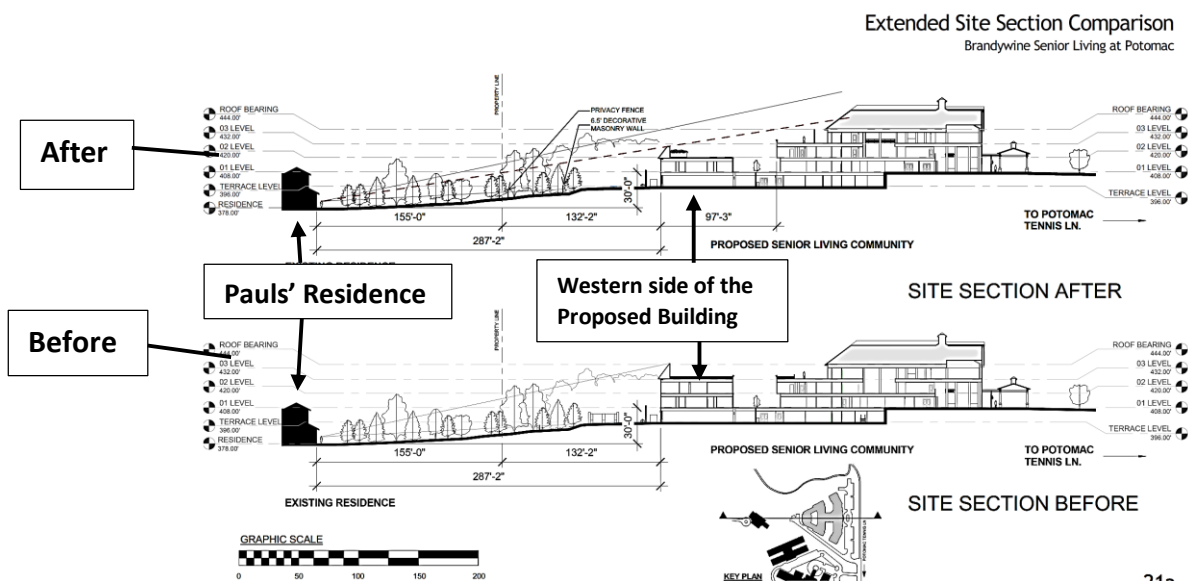
As detailed in Part I of this Report and Decision, a number of changes were made in Applicant's plans. Initially, at the behest of Technical Staff and the Planning Board (Exhibits 74 and 74(a)), the highest roof ridge at the building front was reduced by five feet to reduce visibility from Falls Road. Tr. 11/6/15 156-157. Additional changes were made at the request of the Hearing Examiner to improve compatibility with the Pauls' residence to the west of the subject site. The major changes were cataloged by the Applicant in Exhibit 129(a), filed on December 16, 2015 (*i.e.*, one month before the final January 15, 2016 hearing date), and reproduced below:

CATEGORY	BEFORE	AFTER	COMMENTS ON CHANGES
No. of Stories Facing Dr. and Mrs. Paul	3	2	Removed third floor units from the western portion of the building facing the Pauls' property and annexed them to the third floor of the east side of the building beyond the viewshed of the Pauls.
Height of Building Facing Dr. and Mrs. Paul	48'	36'	Reduced 12' of building height on the western portion of the building facing the Pauls' property within their viewshed.
Distance of Third Floor to Dr. and Mrs. Paul's Residence	287.2'	387.6'	The third story of the western portion of the building facing the Pauls' property is beyond the viewshed of the Pauls as a result of it being pulled back an additional 100.4' from the property line.
Distance of Trash Enclosure to Property Line	32'	69'	Pulled the trash enclosure as close to the Brandywine building as possible and rotated its location. The enclosure is 69' from the property line and 224' from the closest point to the Pauls' residence.
Existence of Decorative Masonry Privacy Wall	No	Yes	Added a decorative masonry privacy wall 6.5'x40' (in addition to the privacy fence) on the western side of the property set back at least 15' from the property line. The wall will be covered with green vegetation on the Pauls' side and serves as an additional privacy barrier (for sound and sight), as well as a security feature for vehicles in the service aisle.
Environmental Site Design Facility	Micro-Bio Planter Box (MBP) with exposed portion on side facing the Pauls' property	In-ground Micro-Bio Filtration Basin (MBF) with no exposure	By re-engineering the stormwater management design, we were able to replace above-ground MBP with a below-ground MBF while further enhancing the vast improvement in current conditions affecting the Pauls' property (reducing current runoff conditions by 96.4%).

By far the most important change to the Applicant's Plans was the removal of the third floor of the proposed building on the western side to improve compatibility with the Pauls' abutting property, as illustrated by the "before and after" Elevation Comparison (Exhibit 124(d)), reproduced below, and by the "Extended Site Section Comparison" (Exhibit 124(c)), which shows distances and the sight lines from a person standing next to the Pauls' residence looking toward the proposed building, both before the December 2015 changes (bottom) and after the changes (top) that would remove the third floor on the western side of the proposed building:



32



21a

Other significant improvements in the December changes were the relocation of the micro-bio-filtration facility away from the western property line, also changing it to an in-ground facility, and relocation of the trash enclosure further from the property line (but still leaving it on the western side of the building, although 37 feet further from the Pauls' property). The Applicant's December 16 summary of changes, above, lists the addition of "a decorative masonry privacy wall 6.5' x 40' (in addition to the privacy fence) on the western side of the property set back at least 15' from the property line." However, the actual Conditional Use Plan filed on December 22, 2015 (Exhibit 131(a)) does not show the addition of that decorative masonry wall along the property line. Rather, it shows a "6.5 foot wall to match the building" at the end of the driveway near the western tip of the site. The proposed decorative masonry wall along the western property line first appears in the proposed Conditional Use Plan filed on January 20, 2016 (Exhibit 145(a)). It was also reflected in the proposed Conditional Use Plan filed on February 5, 2016 (Exhibit 153(b)). Neither of those changes has been accepted.

The only changes proposed for the Conditional Use Plan site layout after December 22, 2015, are reflected in both the Conditional Use Plan filed on January 20, 2016 (Exhibit 145(a)) and the Conditional Use Plan filed on February 5, 2016 (153(b)).⁴ They consist of the proposed addition of the decorative masonry wall along the western property line and the proposed movement of the trash enclosure completely away from the western side of the site over to the northeastern corner of the site, as shown on the proposed Conditional Use Plans in Exhibits 145(a) and 153(b). Even though those additional changes were proposed to reduce any potential impacts on the Pauls' property, and all the major changes were made a month before the final

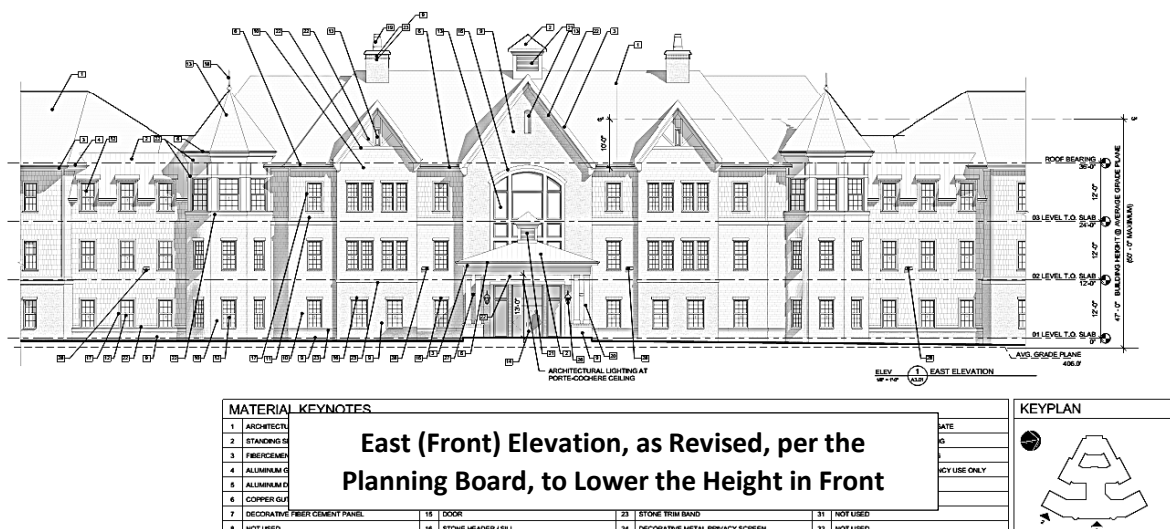
⁴ There was one change to an error in the footnote of the Development Table, but not to the site layout, and as a result of that minor change, the Hearing Examiner reopened the record on February 9, 2016 (Exhibit 162), for an additional 10 days, over the Applicant's objection, to allow the opposition further opportunity for comment.

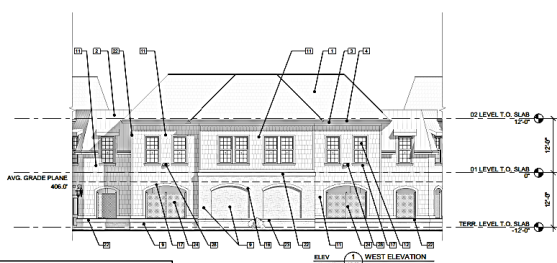
hearing date, with full notice to the parties and the community (Exhibit 128), the modifications to the plans proposed during the hearing process evoked numerous objections from the opposition, which will be discussed in Part II.E.1. of this Report and Decision. After considering these objections, the Hearing Examiner concluded that the changes made on December 22, 2015, were permissible, but those proposed in plans filed after the final hearing date would not be allowed.

The revised facility will be 50 feet high at the front (though considerably lower to the rear, or western side), and will cover about 25% of the lot. As described by Technical Staff (Exhibit 61, p. 7),

... The structure is three stories high [except on the western side where the third story has been eliminated to reduce visual impacts on the Pauls' property], with approximately 50% of the space used for guest housing and the rest for amenities. The structure is being used solely for interior amenity and living space at the front (eastern) half of the building, while the back (western) half of the building will have parking on the ground level with interior amenity and living space extending two stories above. Because of the topography on the site, the roof line will step down a full story from the front along Potomac Tennis Lane to the rear (Figure 5), with the break in roof elevation occurring at the two courtyards that create outdoor enclaves into the building. The structure is designed to be residential in appearance with various architectural details including a pitched roof, dormers and masonry fire places and chimneys and stone clad exterior walls. These architectural elements wrap around the entire building façade for a cohesive look from all directions.

These features can be seen in the revised architectural elevations provided by the Applicant. The eastern (*i.e.*, front) elevation was unchanged during the OZAH hearing (Exhibit 79(f)):

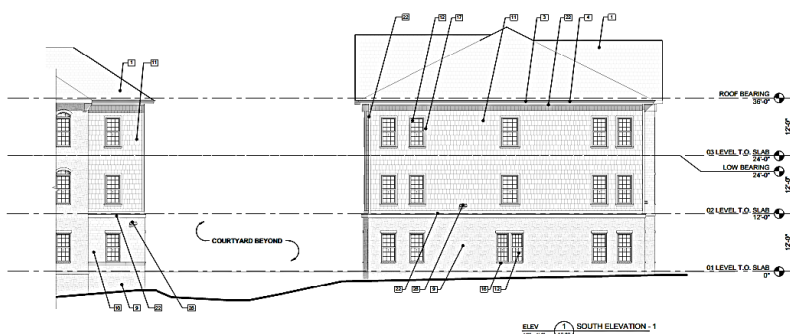
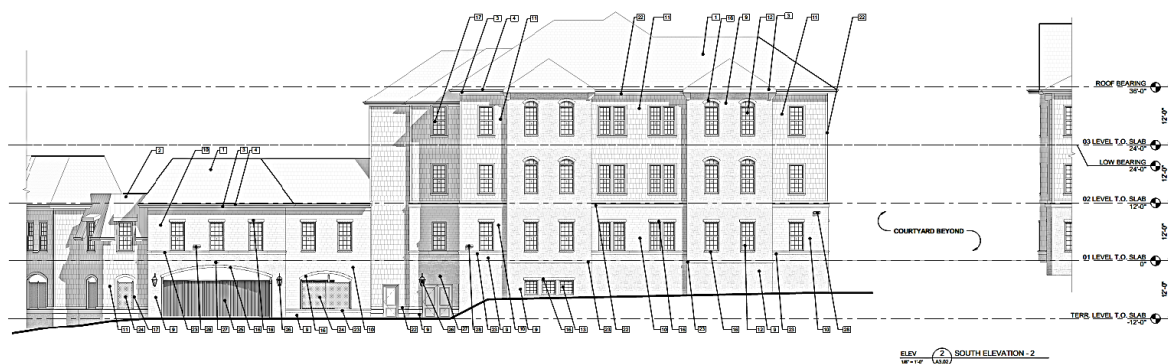




MATERIAL KEYNOTES

MATERIAL NOTES							
1	ARCHITECTURAL, FIBERGLASS SHINGLE ROOF	9	RUSTICATED STONE VENEER	17	FIBER CEMENT WINDOW / DOOR SURROUND	25	DECORATIVE METAL PARKING GATE
2	STANDING SEAM METAL ROOF	10	SMOOTH STONE VENEER	18	DECORATIVE ROOF FINIAL	26	DECORATIVE BUILDING LIGHTING
3	RECORDING CANTER TRINGLE BEING	11	FIBER CEMENT TRINGLE BEING	19	DECORATIVE CHIMNEY CAP	27	RECURRING LEDGES LIGHTING
4	ALUMINUM OUTLET, TYP.	12	SINGLE HUNG WINDOW	20	FIBER CEMENT CORNICE WRAP	28	EXTERIOR LIGHTING - EMERGENCY USE ONLY
5	ALUMINUM DOWNSPOUT, TYP.	13	FIXED WINDOW	21	LOUVERED CUPOLA VENT	29	NOT USED
6	COPPER GUTTER / ROOF FLASHING	14	CORNERPOIN	22	FIBER CEMENT TRIM BOARD	30	NOT USED
7	DECORATIVE FIBER CEMENT PANEL	15	DOOR	23	STONE TRIM BAND	31	NOT USED
8	ICE USED	16	STONE HEADER / SILL	24	DECORATIVE METAL PRIVACY SCREEN	32	NOT USED

KEYPLAN



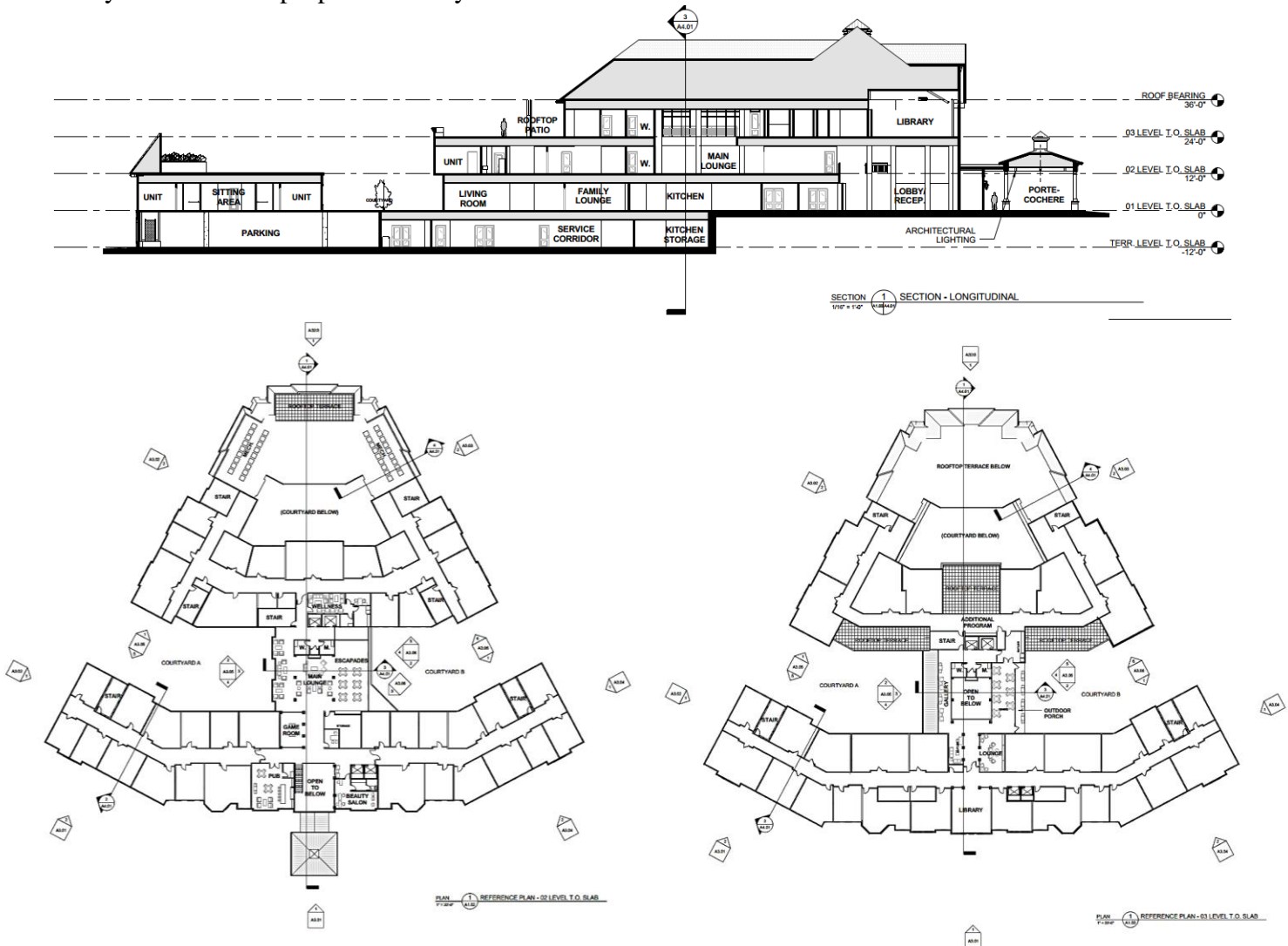
MATERIAL KEYNOTES

WALL MATERIAL NOTES			
1	ARCHITECTURAL, FIBERGLASS SHINGLE ROOF	9	RUSTICATED STONE VENEER
2	STANDING SEAM METAL ROOF	10	SMOOTH STONE VENEER
3	FIBERCEMENT FACHS BOARD	11	FIBER CEMENT SHINGLE SIDING
4	ALUMINUM UTILITY TOP	12	SHINGLE AND SIDING
5	ALUMINUM DOWNSPOUT, TOP	13	FIXED WINDOW
6	COPPER GUTTER / ROOF FLASHING	14	STOREFRONT
7	DECORATIVE FIBER CEMENT PANEL	15	DOOR
8	WALLCOVER	16	STONE HEADER (3/8")
		17	TRANSOM (2" X 8" FIBERBOARD)
		18	STONE TRIM BAND
		19	STONE/CEMENT MESH, PRIVACY SCREEN
		20	DECORATIVE METAL PARKING GATE
		21	DECORATIVE BUILDING LIGHTING
		22	EMERGENCY EXIT LIGHTING
		23	EXTERIOR LIGHTING - EMERGENCY USE ONLY
		24	NOT USED
		25	NOT USED
		26	NOT USED
		27	NOT USED

KEYPLAN



The following “Site Section” and Reference Plans from Exhibit 131 show the general internal layout within the proposed facility:

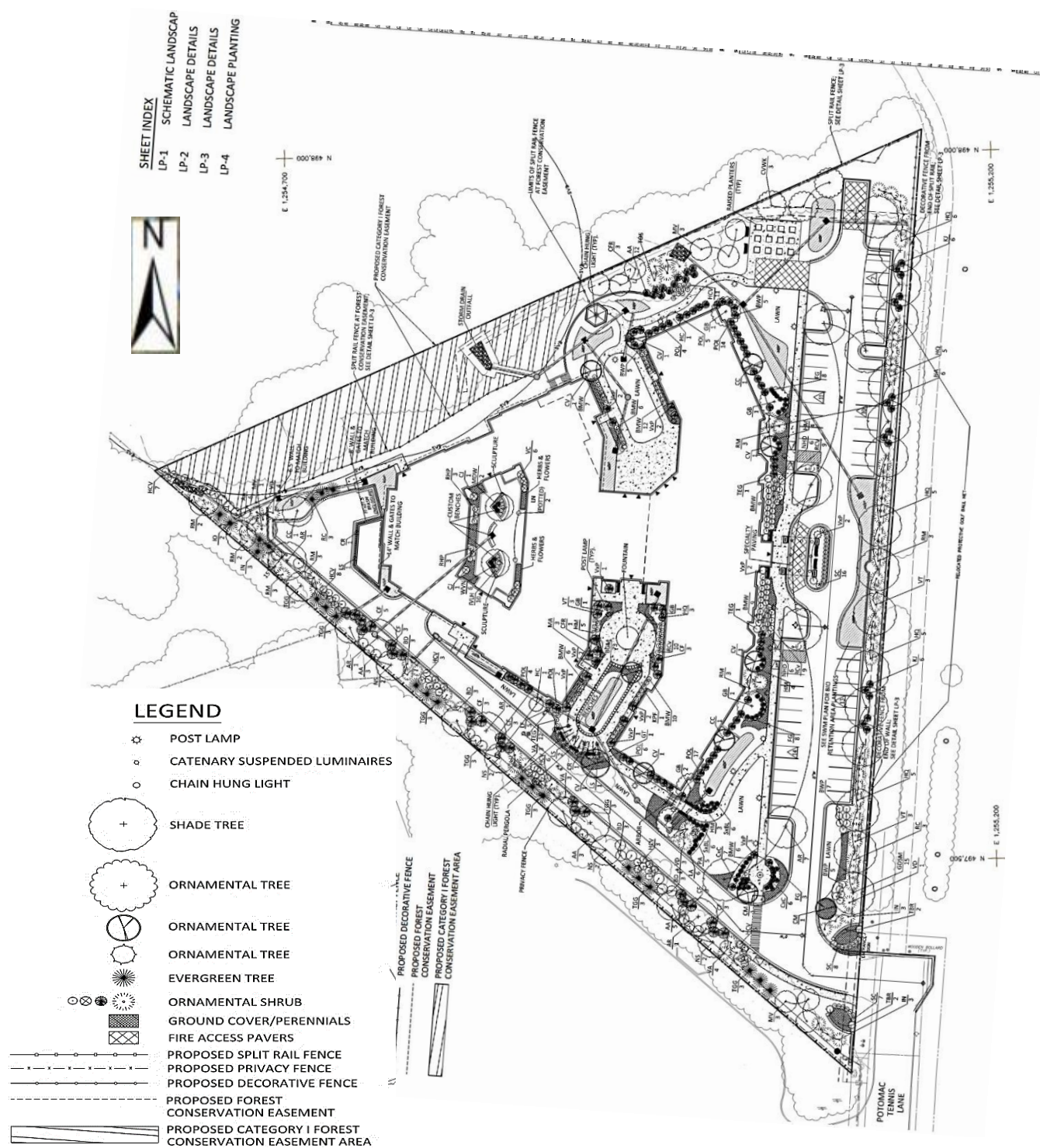


As described in the Applicant’s Statement in Support of the Application (Exhibit 2, p. 4):

... This building will be designed to LEED certification specifications. Suite sizes range between 350 and 850 square feet, depending on the service type and occupancy of the unit. Approximately 50% of the building area will be devoted to amenities for residents, including an indoor pool that can be used for recreation, fitness, or aqua-therapy, beauty salon and spa, music room, pub, and a restaurant-style dining room. Interior and exterior courtyards and walking paths are also proposed for residents’ enjoyment. Seventy-three (73) surface and structured parking spaces are proposed to service employees, visitors, and some residents.

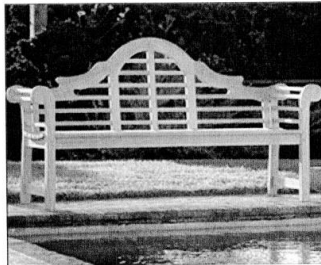
2. Site Landscaping, Lighting and Signage

Landscaping and lighting proposed for the site are shown on Applicant's "Schematic Landscape & Lighting Plan" (Exhibit 131(b)), with details shown on Exhibits 79(c)(ii) and photometrics shown on Exhibit 79(c)(iv). Portions of these plans are reproduced below and on the following pages (omitting some details and the lengthy list of plant names):





Victorian Gazebo
Walpole Outdoors



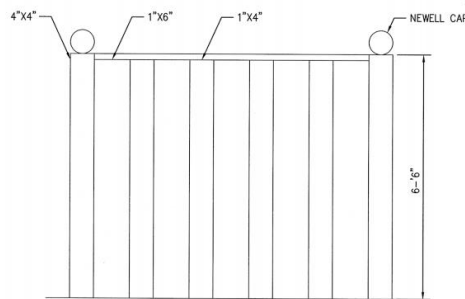
Lutyens Bench
Walpole Outdoors
SKU: 273300
Overall: 47" W x 36" D x 37" H

4' x 4' x 2'



Perfect small raised bed especially for mature gardeners, designed for easy maintenance, letting you reach the center from any side and reduces bending over.

	SIZE	DEPTH
Outside	49.5" x 49.5"	26.5"
Inside	46" x 46"	25"



13 PRIVACY FENCE DETAIL
NOT TO SCALE

OR APPROVED EQUAL

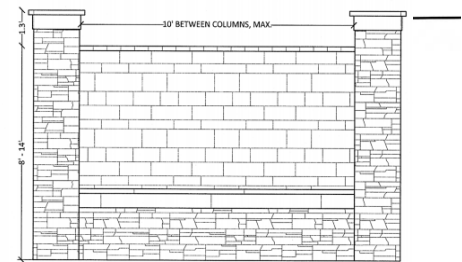
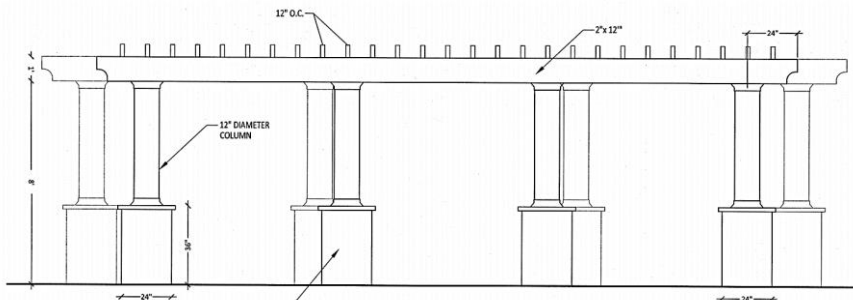


MINKA-LAVERY MERRIMACK

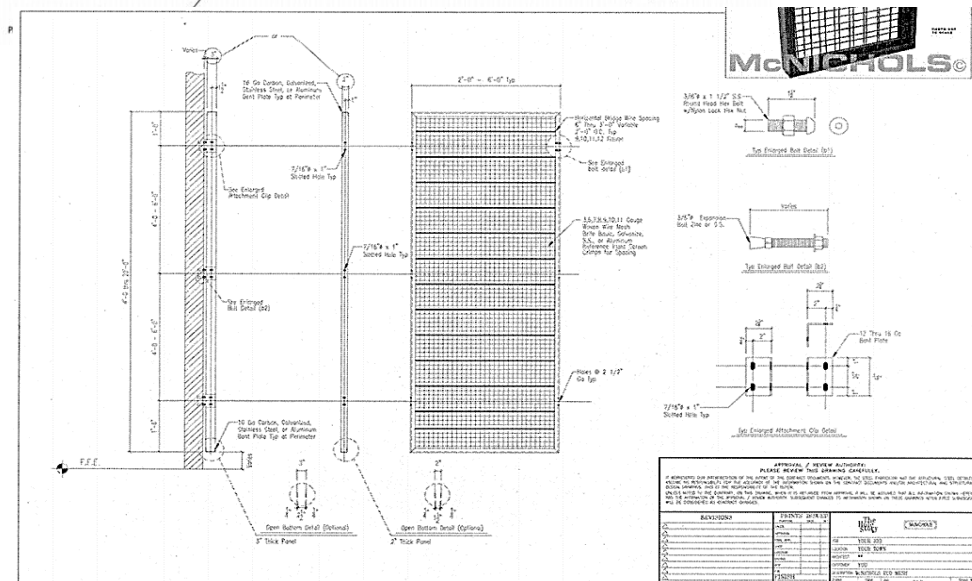


Garden Arbor
Walpole Outdoors
SKU: 796120

Cellular PVC pergola style arbor with 4" sq. posts and 4 1/2" sq. decorative carrying beams. 1 1/2" x 5 1/2" cross members with 1 1/2" sq. pergola lathing. 34 1/2" D. Prefinished white. 6' wide



NOTE: MASONRY FINISHES & DETAILING TO MATCH FINAL ARCHITECTURE



GREEN SCREEN

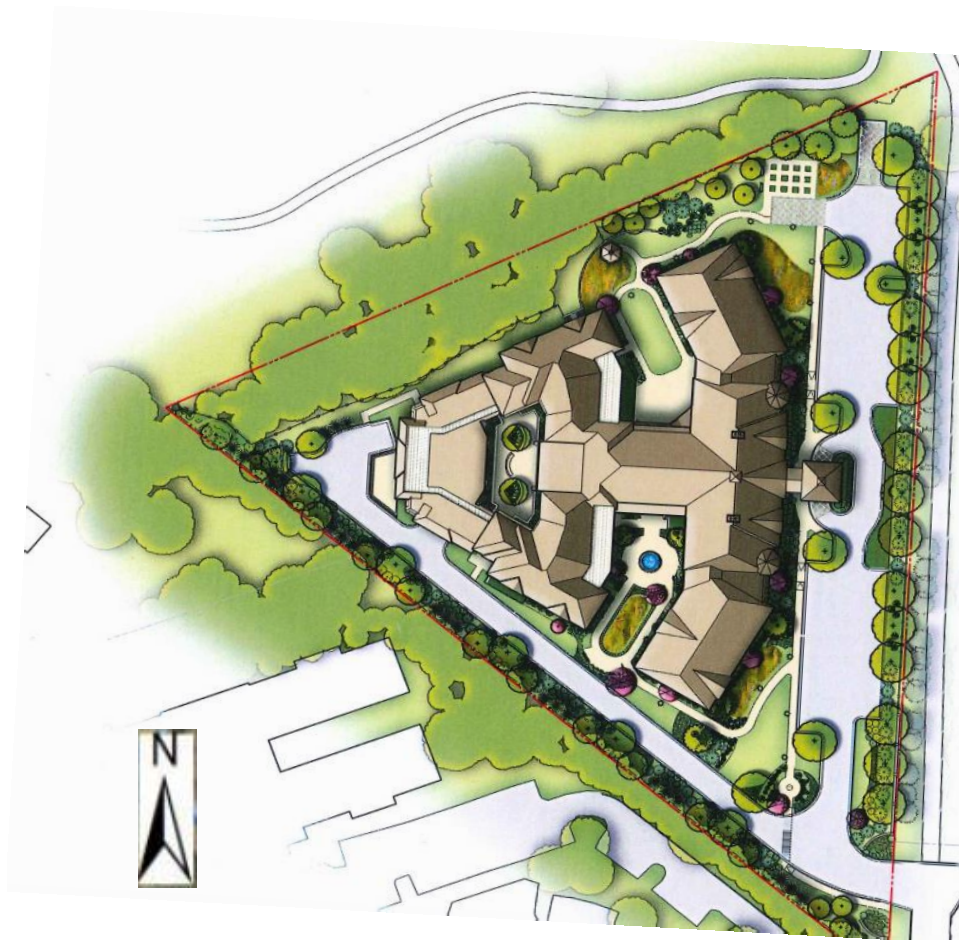
17 NOT TO SCALE

OR APPROVED EQUAL

The outdoor open space areas and proposed landscaping are ably described by Technical Staff (Exhibit 61, p. 7):

The Application also provides for a series of outdoor rooms or courtyards for residents and visitors to enjoy. There are two landscaped gathering areas in the eastern portion of the Site, one near the Site access that includes landscaping and an area of lawn, and a second in the northern corner of the Subject Property with a community garden and a gazebo. There are two semi-private courtyards that are open to the outside but are tucked into buildings side that provide an opportunity to enjoy being outside while still feeling some enclosure by the building. There is an additional “reflections” courtyard located interior to the structure but open to the sky above which provides a fully protected space to enjoy outdoor air without having to fully go outside. All of these outdoor spaces are landscaped with a variety of plant and hardscape materials that provide for a full range of outdoor uses. There is additional perimeter and parking lot landscaping, and a large area of forest replanting in the Site’s northwestern area where the Stream Valley Buffer is located.

The proposed landscaping and open courtyards can be seen on Applicant’s updated rendering of the landscape plan after the removal of the western third floor (Exhibit 134(a)):



Technical Staff describes the proposed landscaping extensively (Exhibit 61, pp. 14-15):

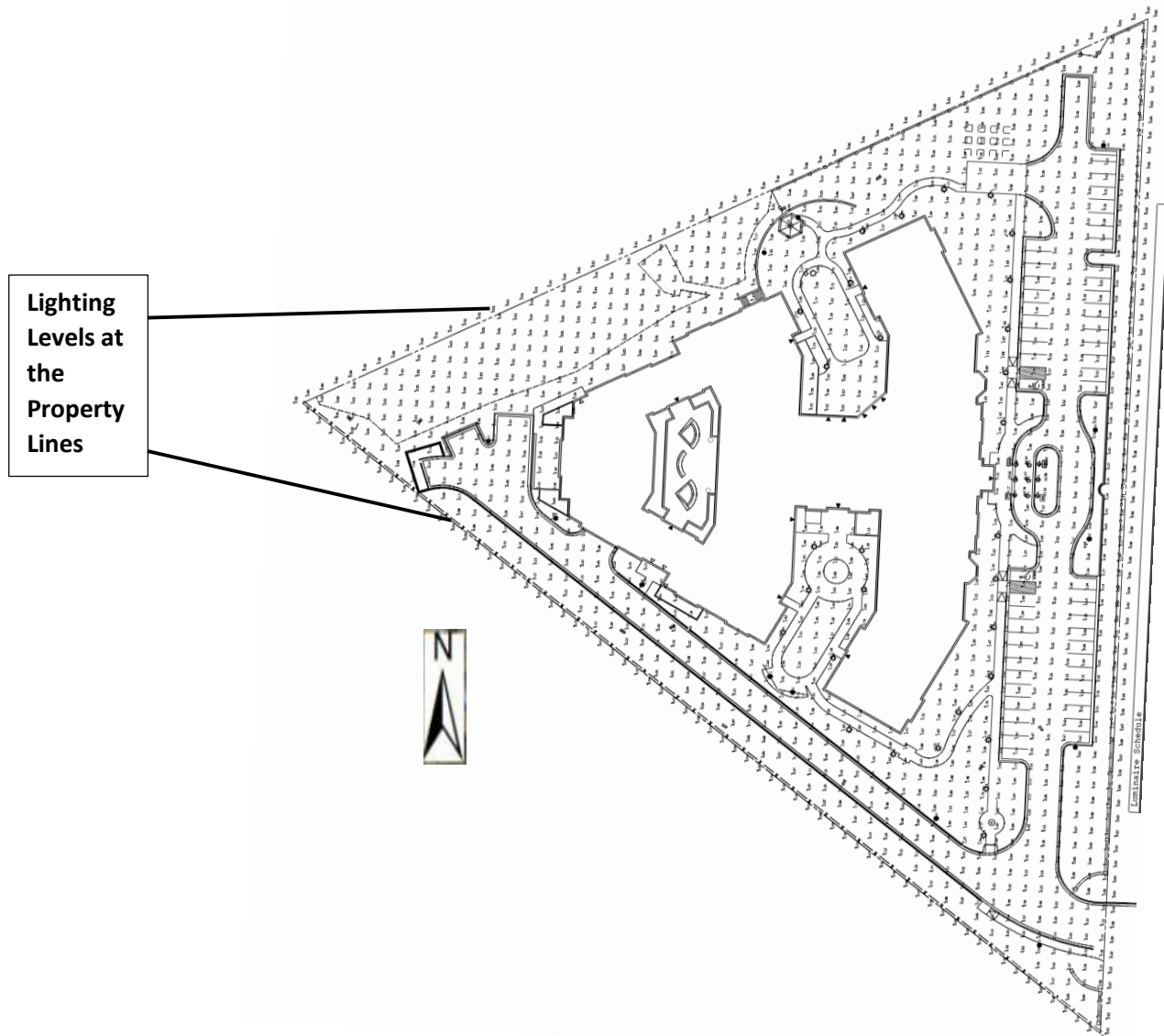
. . . The landscaping on the Subject Property serves multiple purposes, including screening from surrounding uses, softening of the building edge, and to beautify the outdoor amenity areas. Along all outdoor accessible portions of the building edge a variety of traditional English garden shrubs like boxwoods and laurels are proposed and are interspersed with flowering shrubs and understory sized trees. This effect helps soften the masonry appearance of the building and helps create the cottage look the Applicant desires. Additionally, the northern and southern exterior courtyards have been designed in ways to promote different types of outdoor activities. The northern courtyard (Figure 7) has fewer formal plantings and instead has a large patio space and a large lawn panel, making it an ideal location for large outdoor gatherings and games. The southern courtyard (Figure 8) has more formal plantings, a water fountain, a landscaped pergola and a landscaped stormwater management facility which provides for a more intimate space ideal for solitary or small group enjoyment of the outdoors. Along the northern property edge flowering shrubs and understory trees surround a walkway which leads to a gazebo and an outdoor raised planter garden. As discussed in the parking section of this report, landscaping is used in and around the parking lot to provide the necessary screening and canopy cover. The landscaping extends along the eastern property boundary to the Site entrance where evergreens have been placed behind the stone entrance signs to frame the Site access.



The screening requirements identified in [Zoning Ordinance] Section 6.5.3.A . . . and [Section] 6.5.3.C.7 . . . identify a need to screen the Subject Property from the neighboring Residential Care Facility to the south. The requirements, found on page 6-32 of the Zoning Ordinance provide either Option A or Option B for establishing an adequate buffer. The Application meets the requirements of Option B for plant quantity which require a minimum planting depth of 12 feet, with 2 canopy trees, 4 evergreen or understory trees, 8 large and 12 medium shrubs per 100 feet. The Application exceeds the planting area minimum by providing for a 20 foot wide planting area between the Subject Property boundary and the private service alley. The Application meets the shrub density requirements and exceeds the canopy and understory/evergreen tree density requirement along the length of the screening area. In addition to plantings, the Application provides for a 6 Ft. 6

inch high privacy fence along the entire Site boundary with Manor Care to further screen views of any vehicles using the access alley including the glare of headlights. The screening proposed along both the southern and eastern property boundaries is wider and more robust than the existing screening on the Site and will greatly enhance neighborhood compatibility. The only portion of the Subject Property not actively landscaped is in the northwestern portion, which is to be replanted with native trees as a condition of the Forest Conservation Plan, and then placed in a Category 1 Conservation Easement. The landscaping proposed will adequately screen the Site from the neighboring properties and will provide for an inviting and active outdoor experience for residents and guests.

As pointed out by Staff (Exhibit 61, p. 7), the site “will have a range of lighting that is a mix of free-standing pole mounted lighting and canopy undermounted down lighting.” A description of the proposed lighting fixtures, their locations and the levels of lighting extending to the property lines are shown on Applicant’s Photometric Plan (Exhibit 79(c)(iv)):



Luminaire Schedule							
Symbol	Qty	Label	Arrangement	LLF	Description	Tag	Lum. Watts
☉	31	A	SINGLE	0.950	E260LEDFA-3ARC45T5	11' MH	49.5
●	3	C	SINGLE	0.950	STEM HUNG-E260LEDFA-3ARC45T5	8' MH	49.5
☉	10	D	SINGLE	0.950	E260LEDFA-3ARC45T4	11' MH	49.7
☉	9	E	SINGLE	0.950	L6-1740U-G2+L600P-CL	12' MH	22

Calculation Summary								
Label	Description	CalcType	Units	Avg	Max	Min	Avg/Min	Max/Min
CALC POINTS 1	Landscaped area	Illuminance	Fc	0.67	3.91	0.00	N.A.	N.A.
CALC POINTS 3	Parking Lot area readings	Illuminance	Fc	0.75	15.47	0.03	25.00	515.67
CALC POINTS 4	Property Line Readings	Illuminance	Fc	0.04	0.10	0.00	N.A.	N.A.
CALC POINTS 5	Pathway Readings	Illuminance	Fc	1.35	3.87	0.08	16.88	48.38

Permissible lighting levels for a conditional use are specified in Zoning Ordinance §59.

6.4.4.E., which provides,

Outdoor lighting for a conditional use must be directed, shielded, or screened to ensure that the illumination is 0.1 footcandles or less at any lot line that abuts a lot with a detached house building type, not located in a Commercial/Residential or Employment zone.

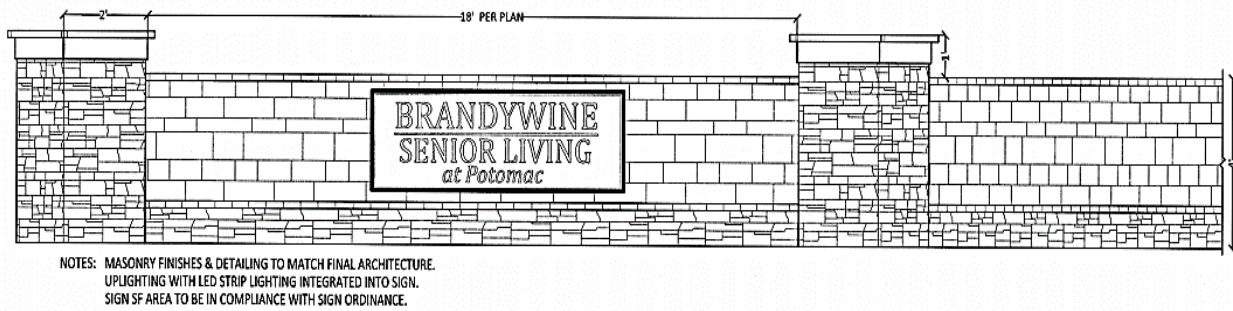
Technical Staff's review of the lighting levels finds that the grounds will be adequately lit, but will not exceed statutory maximum levels at the lot lines:

. . . The Photometric Plan shows that all vehicle and pedestrian circulation areas as well as all outdoor amenity spaces will be lit. The lighting fixture details show that all the fixtures will be from LED's and all provide top shielding and internal refraction lenses to direct light downward away from the sky and neighboring uses . . . [Exhibit 61, p. 7]

The submitted photometric plan does not have a value of more than 0.1 foot-candles projected for any location along the property boundary. The only frontage applicable to this section based on surrounding uses is located to the west of the Site, and the maximum projected illumination at that property boundary is .06 foot-candles which meets the illumination requirements. [Exhibit 61, p. 23]

The Hearing Examiner's own inspection of the photometric plan (Exhibit 79(c)(iv)) reveals some readings along the western property line that exceed the ".06 foot-candles" measurement referenced by Technical Staff, but none that exceed the statutory standard of 0.1 foot-candles along the western property line.

Finally, the Landscape & Lighting Details Plan (Exhibit 79(c)(ii)) shows the proposed entrance signs for the subject site:



The signage is described by Technical Staff (Exhibit 61, p. 7):

The Application proposes entry signage located on either side of the Site access which will be built into a concave curved masonry wall with five foot high columns and four foot high wall sections. The sign will be set into the wall section and will be lit with uplights and an integrated LED strip.

3. Operations

The Applicant detailed the anticipated operations for the proposed facility in its Statement in Support of the Application (Exhibit 2, pp. 5-6):

The Project proposes access to the Property through an existing driveway and curb cut on Potomac Tennis Lane. The traffic generated by the Project will be very limited and result in fewer AM and PM peak hour trips than those generated by the existing Club. As illustrated by the Traffic Statement included in the Application, only 4 trips are projected during the AM peak hour and 8 trips during the PM peak hour. The majority of the trips to and from the site would be from visitors and employees. A car service is provided to the residents to address their transportation needs.

* * *

The proposed community will operate 24 hours a day, 7 days a week, and 365 days a year. The expectation is that the Project will employ a maximum of 110 full and part-time employees in total, generally working in shifts from 7am – 3pm, 3pm – 11pm, and 11pm – 7am. A maximum of 40 employees would be on-site at a given time.

Food and general supplies will be delivered to the Property three times a week on average. Additionally, a trash truck will service the Project three times each week. It is expected that the community will take approximately 27 months to reach full occupancy. Thereafter, it is expected that approximately six move-ins/move-outs would occur per month.

Proposed amenities are outlined on page 3 of Applicant's statement (Exhibit 2):

Similar to Brandywine's other communities, the Project would provide a wide array of services and amenities that are unique to Brandywine communities. Residents of Brandywine communities have a number of options, including a "Serenade" option that includes a dedicated butler service and luxurious furnishings and finishings. Brandywine also provides more advanced memory care services and supervision for individuals with dementia as part of its "Reflections" program that includes concierge service to assist families in achieving the best possible experience in sharing life with a loved one with dementia, including a licensed neuropsychologist consultant to educate and guide families and to assist in the care planning for residents. Brandywine communities also provide highly skilled licensed nurses on site all day and night every day of the year, which service sets them apart from other assisted living communities. Additionally, Brandywine communities feature an "Escapades...for Life!" program that includes daily robust and enriching programs and engagements for its residents.

The Applicant expanded on its proposed operations in an Addendum to its Statement in Support of the Application (Exhibit 39(c)):

As noted in the original statement, the proposed project will employ a maximum of 110 full and part-time employees in total, generally working in shifts from 7 am- 3 pm, 3 pm-11 pm, and 11 pm-7 am, with a maximum of 40 employees on-site at a given time, including part-time and per diem shift personnel. It is important to note that even the expected peak number of employees (40) will only be on-site for a few hours during the mid-day, when all residents are awake and active. Additionally, this maximum will be reached not by all employees arriving at once, but rather over a period of approximately three hours, generally 6 am to 9 am, as employees with varying shifts arrive. For example, department heads cover different shifts to provide an expanded period of management coverage, so some may arrive at 9 am for a 9 am-5 pm shift, and others at 11 am for an 11 am – 7 pm shift. Dining and wait staff, housekeeping and maintenance staff similarly work varied hours. The number of employees on-site also gradually decreases throughout the afternoon, although most departures occur between 2 pm and 3 pm, outside of the evening peak hours. The number of employees on site ultimately tapers to a typical overnight shift of only 7 employees, consisting of nurses and care managers.

Additionally, to expand upon the car service referenced on page 6 of the original Statement, Brandywine will provide a driver, towncar and 16 passenger bus for residents' travel needs. Specifically, if a resident needs or wants to travel off-site for a doctor's appointment, shopping, or other activity, they coordinate with the on-site concierge who then coordinates with the driver to accommodate the resident. If an off-site excursion is planned for a number of the residents, the 16 passenger bus is used to transport residents to and from that activity. As a result of these services, very few residents take personal vehicles to and from the site. These same services are provided at other Brandywine communities and have been found to adequately

meet resident's needs, with demand being managed appropriately between the concierge and driver.

In her testimony about operations at the facility, Brenda Bacon, the CEO of Brandywine Senior Living, testified that deliveries such as from the mailman or FedEx will come to the front door. If it is a large delivery like a food order, which will happen two or three times a week, they will come to the side to the loading dock area and then go right back out. Tr. 11-6-15, 49-50. There is an average of four to five resident move-ins and move-outs per month. Tr. 11-6-15, 69. Deliveries and trash removal will be limited to times specified by the Hearing Examiner.

Technical Staff also discussed access and parking operations at the proposed facility (Exhibit 61, p. 8):

Parking is being provided on the Site in two areas. There is a primary front surface parking lot that has 55 vehicle parking spaces, and a secondary structured parking lot under the back of the building with an additional 18 vehicle parking spaces, and room for 10 bicycles. There is a single Site access point from Potomac Tennis Lane that takes advantage of the existing access point for the Tennis Club. Upon entering the Site the surface parking lot is located to the right, and a private service lane continues to the west paralleling the southern boundary to the western most portion of the Site where the structured parking access, loading dock and trash receptacles are located. At both the far northern end of the surface parking lot and the far western end of the private service lane are paving accommodations that allow for adequate room to turn around an emergency vehicle, supply truck or garbage truck. Both the general supply truck and the garbage truck are expected to service the Subject Property three times per week.

Some of the opposition testimony, especially that given by Dr. Paul at Tr. 12/7/15 189-196, challenged the Applicant's version of the likely amount of activity that would be generated by Applicant's day-to-day operations. His points, and Ms. Bacon's response (Tr. 1/15/16 213-217) will be discussed in Part II.E.2. of this Report and Decision.

D. Environmental Issues

Examination of environmental issues begins with the Applicant's Natural Resources Inventory/Forest Stand Delineation (NRI/FSD) No. 420151830 (Exhibit 37 (b)), which was

approved by the Technical Staff on May 29, 2015 (Exhibit 37(b)). It describes the existing environmental site conditions.

As confirmed by Staff (Exhibit 61, p. 17), the site “is not subject to any impervious caps or a water quality plan and does not contain any rare, threatened or endangered species.”

However, “a tributary of the Kilgore Branch located along the northwestern Site boundary with the associated stream valley buffer located in part on the Subject Property.” In order to deal with related environmental issues, the Applicant was required to submit both a Preliminary Forest Conservation Plan (PFCP) and a Concept Stormwater Management Plan (CSWMP), which are described separately below. Technical Staff concluded (Exhibit 61, p. 17):

The Application will result in a reduction in impervious surfaces, a reforestation of the stream valley buffer and an overall increase in vegetation and stormwater management. The resulting development will ultimately be less impactful to environmental features within the Potomac Master Plan area.

1. Forest Conservation

The Applicant submitted a Preliminary Forest Conservation Plan (PFCP) No. CU201505 (Exhibits 39(g) and 79(b)),⁵ which was approved by the Planning Board on October 21, 2015 (Exhibit 74, p. 3). It establishes a Category I Forest Conservation Easement along the eastern side of the site, adjacent to the Falls Road Golf Course. Forest conservation was not a significant source of dispute in this case. Pursuant to the Planning Board’s approval letter, the Applicant must obtain Technical Staff’s approval of a Final Forest Conservation Plan prior to any land-disturbing activities.

⁵ The Applicant proposed an update to the PFCP on January 20, 2016 (Exhibits 145(d) and (e)) based on revisions proposed in the Conditional Use Plan filed on that date (Exhibit 145(a)); however, as previously mentioned, the changes proposed in that version of the Conditional Use Plan have not been approved, and therefore an update to the PFCP may not be necessary.

2. Stormwater Management

Stormwater management was an issue in this case based on the Pauls' testimony that stormwater from the subject site currently flows onto their land. Tr. 12/7/15 103 and 196. The Pauls also introduced a photograph (Exhibit 99(c)) of an existing pipe that, according to the Pauls (Exhibit 99), currently discharges stormwater from the subject site onto the Pauls' property. This existing drainage problem was confirmed by the Applicant's civil engineer, Donald Mitchell, during the hearing. Tr. 12/3/15 35-41.

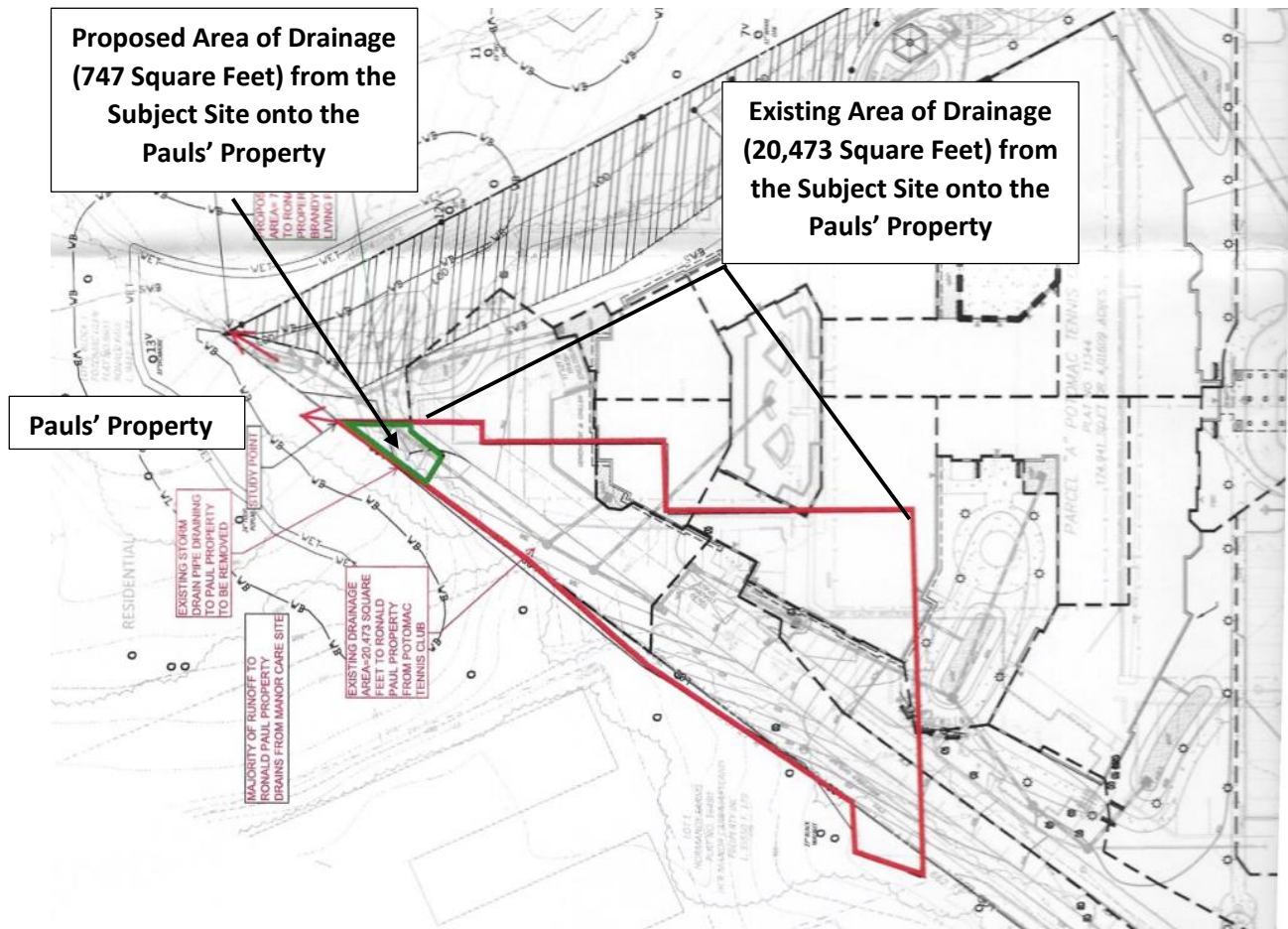
The Applicant addressed this concern with expert testimony from Mr. Mitchell (Tr. 12/3/15 25-150; Tr. 1/15/16 67-81) and with a Concept Stormwater Management Plan (Exhibits 27(a), (b) and (c)), which was approved by the Department of Permitting Services (DPS). Exhibit 39(a). A signed and sealed copy of the CSWMP was filed as Exhibit 79(e)(i). It will have to be updated, prior to the final detailed review by DPS, to reflect revisions made during the hearing to improve compatibility, by moving one of the micro-bio-filtration facilities away from the property line abutting the Pauls' property and converting it to an underground facility (Exhibit 142).

According to the testimony of Mr. Mitchell, the amount of stormwater flowing from the subject site onto the Pauls' property will be dramatically reduced by the stormwater management facilities provided for the new use. Tr. 1/15/16 70-72. Mr. Mitchell introduced a diagram (Exhibit 129(g)) to demonstrate that (Tr. 1/15/16 71):

. . . in existing conditions approximately half an acre or 20,473 square feet of surface area flows by gravity across the ground and flows into the Pauls' property. In proposed condition, this drainage area is reduced by 96.4 percent to a net 747 square feet of surface drainage area that in ultimate conditions will be flowing to the Pauls' property at this northwestern apex of the site.

Mr. Mitchell noted that these results are not only an improvement from current conditions, but also an improvement from that which would have been achieved under the Applicant's original

plans. Tr. 1/15/16 72. A portion of Exhibit 129(g) is reproduced below to illustrate this achievement, with the area outlined in red indicating the amount of drainage from the site onto the Pauls' property under the current conditions, versus the small area outlined in green to indicate the amount of drainage onto the Pauls' property under Applicant's stormwater management plan:



The Applicant's expert engineering evidence was unrefuted at the hearing. Based on that evidence and Technical Staff's approval of the amended plans, the Hearing Examiner finds that the proposed changes will be a net benefit to the environment and will dramatically reduce stormwater runoff from the subject site onto the Pauls' property.

E. Community Response

There was both support and opposition from the community regarding Applicant's proposal. Two prehearing letters of support for the application were filed – one by Michael Marchitto, Jr., Director of Economic Development for Voorhees Township, New Jersey (Exhibit 53) and the other by Cary Prokos, proprietor of nearby Normandie Farm Restaurant (Exhibit 81(c)). Four additional letters of support were filed during the hearing (Exhibit 89(a) – (d)), but only the letter of support from the Mr. Prokos is from within the defined neighborhood.

Prehearing letters of opposition from the community were filed by Nancy Holahan (Exhibit 40); Mr. Curt Uhre on behalf of the Brickyard Coalition (Exhibits 44 and 69); Mr. Uhre individually (Exhibit 81(a)); Dr. and Mrs. Ronald Paul (Exhibits 46 and 70); Judith Braslow (Exhibit 48); Alexandra Arata (Exhibit 51); Kenneth Gross (Exhibit 67); Drs. Robert and Linda Stillman (Exhibit 68); Kenneth Marcus (Exhibit 81(b)); and Julie and Ken Lieu (Exhibit 82). Only one of the letters in opposition is from residents of the defined general neighborhood – the one filed on behalf of Dr. and Mrs. Paul, whose property abuts the western property line of the subject site. On November 13, 2015, after the first hearing date, Susanne Lee, President of the West Montgomery County Citizens Association (WMCCA), filed a pre-hearing statement in opposition (Exhibit 96). On the third day of the hearing (December 7, 2015), Mr. Uhre submitted a petition in opposition with approximately 130 signatures from people with addresses listed throughout the county (Exhibit 119).

Given the number of community members who signed letters and a petition in opposition to this application, the Hearing Examiner must point out that the decision on a zoning application “is not a plebiscite,” and the Hearing Examiner must evaluate this case based on the evidence, not on a nose-count of those for and against. *Rockville Fuel v. Board of Appeals*, 257 Md. 183,

192, 262 A.2d 499, 504 (1970). It is not the Hearing Examiner's function to determine which position is more popular, but rather to assess the Applicant's proposal against the specific criteria established by the Zoning Ordinance. The opposition letters and the opposition petition do raise issues, but all of those issues are already directly in this case through the submissions and testimony of the parties of record who participated in the hearing – the Applicant, the Pauls, the Brickyard Coalition (through Mr. Uhre), the WMCCA (through Ms. Lee) and their witnesses.

Although the Applicant called seven witnesses in the case,⁶ no community witnesses testified in support of the application. Opposition witnesses included Susanne Lee, President of the West Montgomery County Citizens Association; Curtis Uhre, individually and on behalf of the Brickyard Coalition; Ted Duncan, current president of the Brickyard Coalition;⁷ Mrs. Toni Paul; Dr. Ronald Paul; Ronald Danielian, a realtor; James Noonan, a land planner; and Gerald Henning, an acoustical engineer. In addition, the opposition called Benjamin Berbert as a witness. Mr. Berbert is the member of Planning Department's Technical Staff who evaluated both the original plans in this case and the latest revisions. The opposition also introduced documents, photographs and a PowerPoint presentation by Mr. Uhre (Exhibit 110).

The record consists of 167 exhibits and their subparts, and four days of hearing transcripts. Thus, there is an abundance of probative evidence from both sides in this case, as well the evaluation of both the Planning Board and its Technical Staff.

⁶ Brenda Bacon, the President and CEO of Brandywine Senior Living; Joshua Sloan, a land planner and landscape architect; Hal Bolton, an architect; Donald Mitchell, a civil engineer; Anne (Nancy) Randall, a transportation planner and traffic engineer; Donald Boucher, a real estate appraiser; and Scott Harvey, a noise expert.

⁷ Mr. Duncan's testimony and Exhibit 108 were not admitted because, as president of the Brickyard Coalition, he failed to give notice in advance that he would be offering expert testimony. Tr. 12/3/15 229. His proffered expert testimony (and Exhibit 108) went to the issue of real property valuation. Since he is the president of an organization that has been a party to this case for many months, it was clear to the Hearing Examiner that if allowed, such evidence would unfairly avoid the requirement in OZAH Rule 3.5 that organized opposition file expert evidence disclosures 20 days in advance of the hearing. The Hearing Examiner found that under these circumstances, fundamental fairness required that the Hearing Examiner sustain the Applicant's objection and bar his expert evidence, including proffered Exhibit 108. Nevertheless, the opposition was able to introduce expert evidence on this subject matter from a witness called by the Pauls, Ronald Danielian, a realtor.

The opposition's significant concerns fall generally into the following categories:

1. Compatibility and adverse impacts on the neighbors, such as noise and view;
2. Alleged over-concentration of conditional uses;
3. Master Plan Conformance;
4. Zoning Ordinance Compliance;
5. Traffic volume and safety; and
6. Absence of sidewalks along Falls Road affecting pedestrian safety

These issues are discussed in Part III of this report, in connection with the findings required by Zoning Ordinance §59.7.3.1.E., since each of these issues must be addressed to complete the findings listed in that section. However, there are three issues that do not fall within the general purview of the findings called for in Division 59.7 of the Zoning Ordinance, so the Hearing Examiner will address those issues in this section:

1. The procedural objection made by the opposition to revisions in Applicant's plans made during the course of the multi-day hearing – an objection pressed by the opposition even though the changes were clearly intended to alleviate some of the compatibility concerns raised by the opposition;
2. The evidentiary dispute between Applicant's evidence and Dr. Paul testimony regarding the number of people needed to provide services to the residents of the proposed facility; and
3. The contention of some in the opposition that the loss of the existing tennis facility should be a factor in this case.

1. The Objection to Any Amendments to the Plans

Throughout the hearing, Mr. Uhre and Mr. Chen raised a procedural objection to any changes being made in the Applicant's plans after the hearing began, asserting that they are not countenanced by the Zoning Ordinance. Tr. 11/6/15 19-20; Tr. 1/15/16 11-23 and Exhibits 69, 151, 152 and 164. The Hearing Examiner overruled these objections based on the fact that nobody had been deprived of notice of the amendments and all parties had been given ample opportunity to respond. Moreover, all the changes were to the benefit of the neighborhood, improving compatibility with the Pauls' property. Tr. 1/15/16 24-25.

In addition, OZAH Rule 22, approved by the County Council in Resolution No. 17-1210, and adopted September 9, 2014,⁸ clearly recognizes that changes may be made to an application at the public hearing, and indicates that no written notice is required for such changes made during the public hearing. It also empowers the Hearing Examiner to postpone the hearing to a date that permits time for all interested persons to review the amendment. In the subject case, the Hearing Examiner in fact issued written notice on December 15, 2015, giving all parties ample opportunity to comment on the December 2015 amendments and to challenge them through cross-examination and testimony at the hearing on January 15, 2016 (Exhibit 128), which they did. Moreover, as stated by the Hearing Examiner during the hearing (Tr. 1/15/16 13 and 24), it has always been the practice in OZAH hearings (or at least has been for the past 12 years) to allow amendments to the plans to improve compatibility as long as all parties were given the opportunity for fair comment.

Mr. Chen argues that because the Zoning Ordinance does not mention amendments to applications during the hearing, they are *a fortiori* forbidden. The Hearing Examiner does not agree; nor does the case law or common sense, as long as the Hearing Examiner follows its Rules and the parties are given a fair opportunity for comment and cross-examination. *Concerned Citizens of Great Falls, Maryland v. Constellation-Potomac, L.L.C* , 122 Md.App. 700, 716 A.2d 353 (1998). In *Constellation-Potomac*, the court reversed the Board's grant of a special exception because it had closed the record on the last day of the hearing, even though amendments to the plans were made without giving the opposing parties 10 days notice before the final hearing day and a fair opportunity for comment.

⁸ These Zoning Rules of Procedure were modified by the Council on February 2, 2016 in Resolution No.: 18-391, to conform to those additional changes in the Zoning Ordinance, but Rule 22 remained unchanged, except for the numbering of its subparts.

In contrast, the parties to the subject case had months to submit commentary about the plan changes proposed in December of 2015 (which they did), and they were given the opportunity to cross-examine regarding those changes during the January 15, 2016 hearing. Technical Staff was also given the opportunity to review all the proposed plan changes, and it did so more than a week before the hearing resumed on January 15, 2016, with copies to all parties of record (Exhibit 133). It does not make any sense to prohibit any changes to plans when opportunities for improvement become evident at the hearing. The very fact that Section 59.7.3.1.F.1.a. of the Zoning Ordinance permits the Hearing Examiner to “supplement the specific requirements of this Chapter with any other requirements necessary to protect nearby properties and the general neighborhood” is an indication that the Zoning Ordinance countenances changes that may be made to plans to improve compatibility. What possible logic could support precluding the discussion of such changes and cross-examination while the hearing is in progress, given that the Hearing Examiner has the authority to order such changes, as long as the parties have been given an opportunity to object and comment?

Moreover, the Zoning Ordinance gives the Hearing Examiner additional powers to modify the standards for this particular type of conditional use (a residential care facility) based on compatibility considerations. Zoning Ordinance §59.3.3.2.E.2.c.ii.(i) provides:

(i) Height, density, coverage, and parking standards must be compatible with surrounding uses; the Hearing Examiner may modify any standards to maximize the compatibility of the building with the residential character of the surrounding neighborhood. [Emphasis added.]

Given that the Zoning Ordinance expressly confers the Hearing Examiner with that authority in this type of case, it is clear that the Hearing Examiner can have changes made to an applicant's plans during the course of a hearing, should it appear that compatibility considerations call for changes in the plans.

The Hearing Examiner concludes that the opposition's repeated objections to any changes in the Applicant's plans were appropriately overruled, with one exception – the final plan changes proposed in the plans submitted on January 20, 2016 (Exhibit 145(a)) and February 5, 2016 (Exhibit 153(b)). Those changes include the proposal to move the trash enclosure to the northeast corner of the subject site (reluctantly agreed to by the Applicant towards the end of the January 15, 2016 hearing (Tr. 1/15/16 220-221)) and the addition of a decorative masonry wall, which first appeared in the Conditional Use Plan site layout on January 20, 2016, though it was mentioned earlier in textual filings. The Hearing Examiner finds that the objections of Mr. Uhre and Mr. Chen to the final proposed movement of the trash enclosure and the late addition of the “decorative masonry privacy wall” (Exhibits 151, 152 and 164) have some merit, in that they were not included in the Applicant's formal plans before January 20, 2016. Although these may well have been desirable changes, the Hearing Examiner does not find them critical to compatibility, and he is not willing to allow them in the absence of the opposition's agreement,⁹ given their late appearance in the case. Therefore, a condition is included in Part IV of this Report and Decision specifying that the approved Conditional Use Plan is the one submitted on December 22, 2015 (Exhibit 131(a)), not the subsequently proposed versions.

2. The Dispute Over the Number of Staff & Private Aides Needed for the Facility

The Applicant indicated in its Statement in Support of the Application (Exhibit 2, pp. 5-6) that “The expectation is that the Project will employ a maximum of 110 full and part-time employees in total, generally working in shifts from 7am – 3pm, 3pm – 11pm, and 11pm – 7am.

⁹ Although the Hearing Examiner expressly gave the Pauls the opportunity to indicate whether they preferred the original plans or the changed plans (Exhibit 162), they elected not to do so in their filing of February 19, 2016 (Exhibit 164), or at least the Hearing Examiner is unable to discern a stated preference from the discussion contained in that letter. If the parties of record subsequently all agree to adding the January 20, 2016 changes to the plans, the Hearing Examiner would certainly consider such changes as an application for a minor amendment to the conditional use approved today.

A maximum of 40 employees would be on-site at a given time.” In her testimony about operations at the facility, Brenda Bacon, the CEO of Brandywine Senior Living, reiterated this expectation, and added that deliveries such as from the mailman or FedEx will come to the front door. If it is a large delivery like a food order, which will happen two or three times a week, they will come to the side to the loading dock area and then go right back out. Tr. 11-6-15, 49-50. There is an average of four to five resident move-ins and move-outs per month. Tr. 11-6-15, 69. She admitted on cross-examination that residents may have private physicians coming to the site, but they rarely had private aides. Tr. 11-6-15, 110-111.

Dr. Paul challenged the Applicant’s version of the likely amount of activity that would be generated by Applicant’s day-to-day operations. Tr. 12/7/15 189-196. Although not called as an expert witness, Dr. Paul noted that for the past 23 years, he has been a medical consultant to both the Ring House and the Landow House, which he testified are assisted living facilities in Rockville. He has also been a consultant for 20 years to the Hebrew Home, which is a nursing care facility. He described the frail medical condition of many residents of these facilities, and testified that the proposed facility would need more staff on hand than they are admitting to in order to provide needed care. Also, there would be many personal aids, not the rarity Ms. Bacon testified. In addition, deaths of residents will require more trips in and out, as will deliveries and repairs along the driveway. On cross-examination, Dr. Paul admitted that he had never been in a Brandywine facility and can’t speak to their operations. Tr. 12/7/15 210-211.

Brenda Bacon testified in rebuttal that the average number of private duty aides in the 27 Brandywine communities she operates is three, in addition to her staff. She is confident in the accuracy of her projections for the number of staff needed for the proposed use here. Tr. 1/15/16 213-214. She also corrected her earlier testimony which had indicated that the 16-passenger van

would park in the garage. In fact, it will park in the front lot (so presumably it will not have to use the driveway adjacent to the Pauls' property to park). Tr. 1/15/16 215-216.

The Hearing Examiner credits Ms. Bacon's testimony over Dr. Paul's in this case because, despite Dr. Paul's extended experience as a consultant for assisted living facilities in Rockville, he admittedly has no knowledge about the way Brandywine facilities operate, and it is not clear from the evidence that the Rockville facilities he mentions are directly analogous in important respects to the type of facility proposed in the subject case. For example, the record does not establish whether or not Brandywine-type facilities require a more physically fit candidate for admission than the Rockville facilities mentioned by Dr. Paul; nor do we know whether the Brandywine-type facilities offer all of the support services that the Rockville facilities do. Both of these issues impact the number of employees and private aides one might expect in a facility. Ms. Bacon runs 27 facilities of the type the Applicant proposes here, and there is no testimony or other evidence in this record to contradict her statements about the staffing needs of those Brandywine-type facilities. Moreover, conditions will be imposed in Part IV of this Report and Decision which will limit the number of staff permitted on site at any given time to ensure that excessive traffic activity will not be generated.

3. Whether the Loss of a Tennis Facility Should Be Considered

At least two of those who wrote in opposition to the application, Judith Braslow (Exhibit 48) and Kenneth Marcus (Exhibit 81(b)), contend that the proposed use should not be approved because it will result in the elimination of the Potomac Tennis Club currently located on the site. The Hearing Examiner cannot consider such arguments in his evaluation because property owners generally have the right to use their land as they see fit, as long as that use does not violate the Zoning Ordinance or any other applicable law or regulation. The current owner of the

subject site, Potomac Sports, Inc., has authorized the conditional use application. Exhibits 6 and 83.

Whether or not a tennis facility would be a better use of the land than a residential care facility is not within the Hearing Examiner's province to decide. It is the Hearing Examiner's function to examine all the evidence and to decide whether the Applicant has met its burden of establishing that the proposed use satisfies all of the Zoning Ordinance standards for approving a conditional use. We now turn to the specific findings required in the Zoning Ordinance for this type of case.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific to a particular type of use, as set forth in Article 59.3 of the Zoning Ordinance, and general (*i.e.*, applicable to all conditional uses), as set forth in Division 59.7.3 of the Zoning Ordinance. The specific standards applied in this case are those for a residential care facility for more than 16 persons. *Section 59.3.3.2.E.2.c.*

Weighing all the testimony and evidence of record under a "preponderance of the evidence" standard (*Zoning Ordinance*, §7.1.1.), the Hearing Examiner concludes that the conditional use proposed in this application, with the conditions imposed in Part IV of this Report and Decision, would satisfy all of the specific and general requirements for the use.

A. Necessary Findings (Section 59.7.3.1.E)

The general findings necessary to approve a conditional use are found in Section 59.7.3.1.E. of the Zoning Ordinance. Standards pertinent to this approval, and the Hearing

Examiner's findings for each standard, are set forth below:¹⁰ The major topics of discussion are further divided under the following headings:

1. Substantial Conformance with the Master Plan;
2. Adequate Public Services and Facilities;
3. No Undue Harm from Non-Inherent Adverse Effects; and
4. Compatibility with the Neighborhood

E. Necessary Findings

1. To approve a conditional use application, the Hearing Examiner must find that the proposed development:

- a. satisfies any applicable previous approval on the subject site or, if not, that the previous approval must be amended;***

Conclusion: It is undisputed that there is an existing special exception on the site, a private tennis club and fitness facility permitted under Board of Appeals Case Numbers S-424, S-424A, S-424B and S-626. Exhibit 61, p. 18. Obviously, the currently proposed conditional use cannot exist simultaneously with the previously approved special exceptions. Therefore, a condition has been imposed in Part IV of this Report and Decision which requires the Applicant to apply, pursuant to the procedures in the Zoning Ordinance, for revocation of the current special exceptions on the subject site as abandoned, prior to receiving use and occupancy certificates. The Hearing Examiner finds that revocation of the existing special exceptions due to abandonment satisfies the requirements of this provision.

- b. satisfies the requirements of the zone, use standards under Article 59-3, and to the extent the Hearing Examiner finds necessary to ensure compatibility, meets applicable general requirements under Article 59-6;***¹¹

¹⁰ Although §59.7.3.1.E. contains six subsections (E.1. through E.6.), only subsections 59.7.3.1.E.1., E.2. and E.3. contain provisions that apply to this application. Section 59.7.3.1.E.1. contains seven subparts, a. through g.

¹¹ The underlined language was added by the Council when the 2014 Zoning Ordinance was amended effective December 25, 2015, in ZTA 15-09 (Ordinance No. 18-08, adopted December 1, 2015). The Hearing Examiner advised the parties of this amendment to the Zoning Ordinance and that the changed language would apply to this case. He also gave the parties an opportunity to comment. Tr. 12/3/15 12-13; Tr. 12/7/15 9. To the recollection of the Hearing Examiner, no party objected to applying the amended Zoning Ordinance language to this case.

Conclusion: This subsection requires an analysis of the standards of the RE-2 Zone contained in Article 59-4; the use standards for a residential care facility for more than 16 persons contained in Article 59-3; and the applicable development standards contained in Article 59-6. Each of these Articles is discussed below in separate sections of this Report and Decision (Parts III.B, C, and D, respectively). Based on the analysis contained in those discussions, the Hearing Examiner finds, as did Technical Staff (Exhibit 61, p. 1), that the application satisfies the requirements of Articles 59-3, 59-4 and 59-6.

1. Substantial Conformance with the Master Plan

c. substantially conforms with the recommendations of the applicable master plan;

Conclusion: The property lies within the geographic area covered by the 2002 *Potomac Subregion Master Plan*, and the proper interpretation of the Master Plan was hotly disputed in this case.

The opposition contends that the proposal violates important Master Plan policies. Mr. Uhre testified regarding his concerns about Master Plan conformity, arguing that there should be increased scrutiny in reviewing conditional use applications for a highly visible site and that the proposed use is too intense for the RE-2 Zone. Tr. 12/7/15 15-28. The opposition's Master Plan argument was most thoroughly spelled out by Susanne Lee, President of the West Montgomery County Citizens Association. Exhibit 109 and Tr. 12/3/15 233-277. Her testimony touched on issues of the green wedge, overconcentration of special exceptions, traffic problems and compatibility (Tr. 12/3/15 233-237, 259-265), but her central argument is that the language of the Master Plan (pp. 36-38) requires that conditional uses providing housing for the elderly in the Potomac Subregion be located only at one of five sites specifically mentioned in the Master Plan. Tr. 12/3/15 238-255. As the Hearing Examiner stated at the hearing (Tr. 12/3/15 239-241), he

disagrees with Ms. Lee's reading of the Master Plan because the plain language of the Plan (p. 38) provides, "Senior housing is appropriate throughout the Subregion wherever zoning permits this use, either by right or as a special exception use." [Underlining added.] The fact that the Plan also mentions five locations which it identifies as probably appropriate does not mean that it excludes other possible locations "throughout the Subregion."

Although the opposition called James Noonan, a land planning expert, as a witness, he did not testify with regard to Master Plan conformity. Tr. 12/7/16 214-259 and Tr. 1/15/16 192-205. In contrast, Applicant's land planner, Joshua Sloan, who actually worked on drafting the Master Plan in question (Tr. 11/6/15 118-119), found that the Applicant's proposal "was in conformance with the Master Plan recommendations." Tr. 11/6/15 148. In fact, there is no expert testimony in this record to contradict the findings of Technical Staff and the Applicant's land planner with regard to the Master Plan.

Neither the Technical Staff nor the Planning Board agreed with Ms. Lee's and Mr. Uhre's interpretation of the Master Plan, in that both recommended approval of the conditional use. Since the Technical Staff and the Planning Board are the drafters of master plans and are generally responsible for their application once approved by the County Council, the Hearing Examiner must give considerable weight to their interpretation of their own regulations. As stated in *Watkins v. Secretary, Dept. of Public Safety and Correctional Services*, 377 Md. 34, 46, 831 A.2d 1079, 1086 (2003), "We must respect the expertise of the agency and accord deference to its interpretation of a statute that it administers."

Technical Staff discussed each of the Master Plan issues raised by the opposition in its report (Exhibit 61, pp. 25-27) and in its supplemental response to the issues raised by the community (Exhibit 61, Attachment 17). Staff advises that the Plan does not contain any site-

specific recommendations, “but does provide a series of overall plan policies and strategies which do apply to the Application.” Exhibit 61, pp. 25-27. Technical Staff lists three Master

Plan policies of particular application:

1. Maintain a low-density residential “green wedge.”

The Master Plan seeks to maintain the low-density “green wedge,” however, as observed by Staff, a residential care facility is allowed as a conditional use. The proposed use meets the specified standards and provides ample landscaping and screening from the neighboring uses.

2. Special Exception Policy (as set forth on pages 35-36 of the Plan). It recommends:

- *Increased scrutiny in reviewing new Special Exceptions for highly visible sites.*

Staff notes that visibility of the subject site is greatly reduced from Falls Road because of the topography and the surrounding uses. The Manor Care site is closer to Falls Road than the proposed use along Potomac Tennis Lane, and Manor Care sits 10 feet higher in elevation at the base floor than the proposed structure. Direct access and all signage to the site would be located on Potomac Tennis Lane, further reducing the visibility of this conditional use. Moreover, the Applicant used building design, landscaping and screening to further complement its surroundings.

- *Avoid an excessive concentration of special exceptions along major transportation corridors.*

Staff found that the site is not highly visible from Falls Road, reducing the concern over the proposed use, and will not create additional traffic burdens on the major transportation corridors. Since there is an existing special exception on site that will be abandoned, the total number of conditional uses along the Falls Road corridor remains the same, and the nature of the conditional use shifts from a recreational club to a residential use.

- *Additional Guidelines:*
 - a. Adhere to the zoning Ordinance requirements to examine compatibility with the architecture of the adjoining neighborhood.*
 - b. Parking should be located and landscaped to minimize commercial appearance... front yard parking should be allowed only if it can be adequately landscaped and screened.*
 - c. Efforts should be made to enhance or augment screening and buffering as viewed from abutting residential areas and major roadways.*

Staff found that the proposed use would comport with each of these additional guidelines.

3. Housing for the Elderly

As discussed above, the Master Plan makes specific recommendations on pages 36-38 of the need for additional housing for the elderly to allow residents the opportunity to age in place within the community. The Master Plan recognizes that “The Potomac Subregion does not fully meet its residents’ needs for senior housing within its boundaries.” It adds that this need for housing will likely increase with time. Staff notes that although the Master Plan identifies prime locations for including elderly housing, it endorses locating senior housing “throughout the Subregion wherever zoning permits this use, either by right or as a special exception use.”

The Hearing Examiner agrees with Staff’s analysis. Based on this record, the Hearing Examiner finds that the proposed use substantially conforms with the recommendations of the 2002 Potomac Subregion Master Plan.

d. is harmonious with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the plan;

Conclusion: This provision is a mix of Master Plan analysis and compatibility considerations. The Master Plan issues have been discussed in connection with the previous provision, and the Hearing Examiner concluded that the proposed use substantially conforms to the Master Plan’s recommendations. Compatibility is a question that crosses a number of topics, including the nature of the surrounding uses; any potential adverse impacts; the design of the proposed building, including its height, density and architecture; traffic generation; and other issues to be discussed extensively in other sections below.

The surrounding neighborhood is by no means exclusively defined by single-family residences. A tennis club and related facilities currently sit on the subject site; the Falls Road Golf Course is immediately to the north and east; the Manor Care and Arden Courts facilities are immediately to the south; the Normandie Farms restaurant is to the south of that; and the Bullis

School is just across Falls Road. Although the Pauls' residence and other homes are within the neighborhood to the west of the subject site, the addition of the proposed use would not be "alter[ing] the character of the surrounding neighborhood," which is the question posed by this provision. Clearly, the proposed use would be harmonious with the services for the elderly provided by Manor Care and Arden Courts, and it will also be heavily screened from the golf course by a forest conservation easement and other buffers. The only true compatibility concern arises in connection with the adjacent residence owned by the Pauls, and that topic will be addressed in connection with the "undue harm" evaluation discussed in Part III.A.3., below, and the compatibility provision discussed in Part III.A.4., below. Impacts on traffic volume will be discussed in Part III.A. 2., below. Based on those discussions, the Hearing Examiner finds that the proposed use will be harmonious with the neighborhood.

e. will not, when evaluated in conjunction with existing and approved conditional uses in any neighboring Residential Detached zone, increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area; a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area;

Conclusion: Technical Staff reports that there are four existing conditional uses or special exceptions within the neighborhood—the Manor Care (and Arden Courts) facilities to the south, the Bullis School to the east of Falls Road, a telecommunications tower to the north and the current tennis club on the subject site. As noted by Staff, the proposed use will not be adding to the number of special exceptions, but rather substituting a different conditional use (a residential care facility) for one already existing on the site (a tennis facility). In fact, the proposed residential care facility is classified as a residential use in the Zoning Ordinance, which the current tennis club on the site is not. As will be discussed later in this Report, compatibility of

the proposed use with the surrounding neighborhood must be analyzed without reference to the existing use on the site because the existing tennis club will no longer be there if the proposed use is constructed; however, the question of whether the proposed use would alter the predominantly residential nature of the area (which is the question posed by this Code provision), must logically be analyzed with reference to the existing use that will be altered. Although the proposed use is arguably a more intense use than the current tennis facility, it will be architecturally much more residential in appearance than a large tennis bubble, and it will be very well screened from the surrounding neighborhood. The Hearing Examiner finds that the proposed use will not increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Moreover, as specified in the last clause of the provision, “a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area.”

2. Adequate Public Services and Facilities

f. will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage, and other public facilities. If an approved adequate public facilities test is currently valid and the impact of the conditional use is equal to or less than what was approved, a new adequate public facilities test is not required. If an adequate public facilities test is required and:

i. if a preliminary subdivision plan is not filed concurrently or required subsequently, the Hearing Examiner must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; or

ii. if a preliminary subdivision plan is filed concurrently or required subsequently, the Planning Board must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire

protection, water, sanitary sewer, public roads, and storm drainage; and

Conclusion: Technical Staff reports that “the Subject Property is already a recorded lot [and] therefore future submission of a Preliminary Plan of subdivision is not required.” Exhibit 61, pp. 11-12. Under Subsection 59.7.3.1.E.1.f.ii., quoted above, it is therefore the Hearing Examiner who must determine the adequacy of public services and facilities to serve the proposed use, including schools, police and fire protection, water, sanitary sewer, public roads and storm drainage. We begin with transportation facilities.

a. Local Area Transportation Review and Transportation Policy Area Review

The Hearing Examiner’s findings regarding transportation facilities are in large part determined by reference to the Planning Board’s Guidelines for Local Area Transportation Review (LATR) and Transportation Policy Area Review (TPAR), adopted January 24, 2013. In addition to the LATR Guidelines, in this case, the impacts on traffic volume at the relevant intersections were evaluated using the Highway Capacity Manual Methodology (HCM) for unsignalized intersections to determine gaps in traffic and queue lengths.¹²

The LATR Guidelines are designed to evaluate the adequacy of the local road network by measuring congestion at roadway intersections based on critical lane volume (CLV) and volume to capacity ratio (v/c). LATR projects the impact of trips to be generated by the proposed development, taking into account existing development and developments that are approved, but not yet built. Applications that are expected to generate fewer than 30 trips are exempt from LATR review, but must submit a “Traffic Exemption Statement” to demonstrate that the number generated by the proposal will be under 30-trip maximum. *Guidelines*, p. 3.

¹² This section addresses only traffic volume issues. Traffic safety issues raised by the opposition (*i.e.*, the safety of the Falls Road and Potomac Tennis Lane intersection and pedestrian safety) are addressed in Part III.A.3. of this Report.

The Applicant's transportation planner, Nancy Randall, submitted the required Traffic Exemption Statement to Technical Staff on March 27, 2015, using LATR trip generation rates to project trips from the proposed use. Exhibit 20. She testified that applying the LATR trip generation rates, and offsetting projected trips against existing trips, resulted in a projected reduction from the proposed use of 12 trips in the morning peak hour and a reduction of 32 trips in the evening peak hour. Tr. 12/3/15 153-154.

The Applicant indicates that because the existing conditional use on the site (the Potomac Tennis Club) has been operating on the site for more than 12 years, the LATR Guidelines allow the current traffic produced on the site to be offset against that which will be produced under the proposed use. The opposition takes issue with this interpretation of the LATR Guidelines. The provisions in question are found on page 17 of the Guidelines (Exhibit 115):

To warrant an LATR traffic study, a proposed development must have a measurable traffic impact on a local area. Measurable traffic impact is defined as a development that generates 30 or more total (i.e., existing, new, pass-by, and diverted) weekday peak hour trips in the morning (6:30 a.m. to 9:30 a.m.) and/or evening (4:00 p.m. to 7:00 p.m.) peak periods. If the proposal generates less than 30 trips or is a renovation of an existing development and will generate no net increase in trips, a traffic exemption statement is required instead of a traffic study.

An LATR traffic study is not required for any expansion that generates five or fewer additional peak hour trips if use and occupancy permits for at least 75 percent of the originally approved development were issued more than 12 years before the LATR traffic study exemption request. If an LATR traffic study is required, the number of signalized intersections in the study will be based on the increased number of peak hour trips rather than the total number of peak hour trips. [Emphasis added.]

Mr. Uhre argues that the proposed use is neither a "renovation" nor an "expansion," and therefore all of the trips to be generated by the proposed use must be counted, thereby requiring a full traffic study. Tr. 12/7/15 50-52. Mr. Chen argues that, as with an evaluation of compatibility, the traffic to be generated by the proposed use should be evaluated by itself, and not in conjunction with the existing use. Tr. 11/6/15 214-215.

Technical Staff rejected this argument in Attachment 17, p. 3, to its report (Exhibit 61):

. . . It is Planning Board Policy, written in the LATR/TPAR guidelines, that the existing trips generated by a property can be subtracted from the trips that a proposed use generates when performing the LATR/TPAR analysis. The traffic statement provided by the Applicant explains this and appropriately takes credit for these trips in the traffic statement. Additional analysis was performed by the Applicant and explained by Staff on page 11 of the Staff Report, which shows that transportation is adequate for the Application.

While the Hearing Examiner finds the linguistic argument made by the opposition to be intriguing, agencies are entitled to considerable deference in interpreting the words used in their own regulations, as previously noted. *Watkins v. Secretary, Dept. of Public Safety and Correctional Services*, 377 Md. 34, 46, 831 A.2d 1079, 1086 (2003). Moreover, there is a perfectly good logic to Technical Staff's approach, as they are trying to determine whether a proposed new use will create additional traffic burdens, and to quantify that additional traffic burden if it exists, in order to ensure adequate transportation facilities. The question is not whether the proposed use will create more traffic than a hypothetical single family residence or two on the site, but rather whether it will create an unacceptable additional burden on the roads. The Hearing Examiner agrees with Technical Staff that traffic impacts should be measured on a comparative basis under Local Area Transportation Review (LATR). Tr. 11/6/15, 214; Tr. 12/7/15 50-52.

At the request of Technical Staff, Ms. Randall submitted a revised Traffic Exemption Statement on September 11, 2015 (Exhibit 61, Attachment 6), this time using trip generation rates developed by the Institute of Transportation Engineers (ITE) instead of the LATR trip generation rates. In her September 11, 2015 letter, Ms. Randall found that (Exhibit 61, Attachment 6):

. . . the proposed assisted living project development will generate 20 AM peak hour trips and 31 PM peak hour trips. When comparing the existing use of a tennis

club to the proposed 140-bed Brandywine/Potomac Assisted Living facility, the redevelopment will result in an increase of four (4) AM peak hour trips and a decrease of nine (9) PM peak hour trips.

This count was reflected in a Table shown in the Technical Staff Report (Exhibit 61, p. 10):

Site Trip Generation Table

Proposed Development	Courts/ Beds	AM Peak Hour			PM Peak Hour		
		In	Out	Total	In	Out	Total
Current Use							
Tennis Club (ITE 491)	12	8	8	16	20	20	40
Proposed Use							
Assisted-Living Facility (ITE 254)	140	13	7	20	14	17	31
Net Trips		5	-1	4	-6	-3	-9

Despite Technical Staff's agreement with the Applicant that only a Traffic Exemption Statement was required in this case, Staff asked the Applicant to supplement its Statement with additional analysis, which it did in the form of a letter from Nancy Randall dated September 25, 2015 (Exhibit 61, Attachment 7). Ms. Randall described the additional analysis on pages 1-2 of that letter:

... The analysis includes a review of both the intersection of Tennis Lane and Falls Road as well as the main Bullis School Entrance and Falls Road intersection, with and without the Brandywine Assisted Living project.

Counts of the two intersections were conducted on September 16, 2015 from 7:00 AM to 9:00 AM and from 2:30 PM to 6:00 PM. In addition to the turning movement counts we also conducted a queue count for the southbound Falls Road left turn into the Bullis School and the northbound Falls Road left turn into Tennis Lane. A Gap study was also conducted on Falls Road to record the number and length of gaps between vehicles on Falls Road in both the northbound and southbound directions.

Intersection capacity analysis was conducted using two different methods (1) the Critical Lane Methodology (CLV) in accordance with the MNCPPC guidelines and the Highway Capacity Manual Methodology (HCM) for unsignalized intersections. The analysis includes three time periods the AM peak, Mid-day Peak and PM peak and the results for both analysis methodologies are shown in Table 1. The analysis also included the anticipated increase in the AM peak hour volume from Brandywine Assisted Living. Due to the change in use of this property only the AM peak hour will experience and increase in volume. Therefore, only the AM peak

hour is impacted by the change in use. As a conservative measure we did not decrease the existing PM volumes that will result with this change in use.

The results of the intersection capacity analysis show that the intersections are operating well within the 1450 CLV standard for the Potomac Policy area, with the highest CLV under the total future condition of 959 CLV. The HCM results show that the delay at the intersection of Tennis Lane and Falls Road and the intersection of Falls Road and Bullis School Entrance are well within driver tolerances and well below the capacity of 50 seconds of delay for turning movement or approach. Neither intersection will experience a delay greater than 31 seconds on any approach and or movement for any of the peak periods. Copies of the turning movement counts, CLV work sheets and the HCM summaries are attached for your review.

The Gap Acceptance Study results shown in Table 2A and 2B indicate that there are more than sufficient gaps of adequate duration to accommodate the existing and future left turns from Falls Road to Tennis Lane and Bullis School entrance. Copies of the gap acceptance data are attached for your review.

The results of the queue observations shown in Tables 3A and 3B show the maximum observed queues at both intersections during the three peak periods. The maximum queue observed at the intersection of Falls Road and Tennis Lane occurred during the morning peak hour with a total of 4 vehicles in the northbound Falls Road left turn lane for a maximum queue distance of 100 feet. The average queue during the peak fifteen minute period was 0.47 vehicles. The available storage distance for left turn vehicles is approximately 150 feet.

The maximum queue observed at the intersection of Falls Road and Bullis School entrance was 7 vehicles in the southbound left turn lane on Falls Road for a maximum queue distance of 175 feet. The average queue during the peak fifteen minute period was 3.53 vehicles. The available storage distance for left turn vehicles is approximately 200 feet. It should be noted that the maximum queue observed at the intersection of Falls Road and Tennis Lane did not occur during the same 15 minute period as the maximum queue observed at the intersection of Bullis School and Falls Road. [Emphasis added.]

Ms. Randall also testified at the hearing that the trip generation rates account for all the traffic that will be generated by the proposed use, not just employees. “It counts every vehicle. Employee, delivery, mail truck, FedEx, visitor. It’s everything that crosses the entry into the project.” Tr. 12/3/15 166. In Ms. Randall’s expert opinion, the proposed use “will make things better since there will be a reduction in [traffic] volume.” Tr. 12/3/15 167.

There is no opposing expert testimony regarding transportation facilities or traffic

volumes. However, there is anecdotal evidence from Mr. Uhre, who introduced two photographs of traffic he observed on Falls Road at Potomac Tennis Lane at 8:30 AM on October 14, 2015, showing backups in both directions (Exhibits 69(c)(i) and (ii)). According to Mr. Uhre, these are “an example of traffic backed up with people unable to make left-hand turns onto Potomac Tennis Lane. And it's not an uncommon experience for those of us who drive this road to see this type of a traffic backup.” Tr. 12/7/15, 44.

Technical Staff began its analysis of transportation facilities by reporting the trip generation figures submitted by the Applicant in applying ITE trip generation rates. Staff then noted that under Transportation Policy Area Review (TPAR), “a TPAR of 25% of the General District Transportation Impact Tax is required . . . [in this case].” Exhibit 61, p. 10. The TPAR figures are not an issue in this case.

Technical Staff then reviewed the traffic situation near the site on Falls Road and found that the existing road capacity would be adequate to handle the proposed use (Exhibit 61, p. 11):

. . . There is an existing left turn lane along northbound Falls Road, at the intersection of Potomac Tennis Lane. This left turn lane has a stacking capacity of 125 feet, which provides room for up to six vehicles to stack. Because the proposed use only generates a net of four new AM peak hour trips and a net reduction in PM peak hour trips, there is not expected to be any new operational issues created at the intersection of Potomac Tennis Lane and Falls Road.

Additionally, the Applicant’s traffic engineer performed traffic counts to obtain critical lane volume (“CLV”) readings for the intersection of Potomac Tennis Lane and Falls Road, and performed a gap analysis and queueing analysis for Falls Road at Potomac Tennis Lane and the entrance to the Bullis School (Attachment 07). The observed CLV under future conditions (four additional AM peak hour trips, no new PM peak hour trips) was 959, which is well under the 1450 CLV standard set forth in the LATR/TPAR guidelines for what constitutes a failing intersection. The gap analysis showed there are sufficient gaps for vehicles looking to make turns at Potomac Tennis Lane with no intersection experiencing a delay of more than 31 seconds during any approach during any of the studied times. Physical observations of the number of queued vehicles also showed that the number of cars ever queued at one time was less than what the existing turning lanes can handle.

Considering this record, the Hearing Examiner finds transportation facilities will be adequate to handle traffic to be generated by the proposed use. There is no expert evidence in the record to refute Applicant's evidence that the proposed use will actually reduce traffic on nearby roads applying LATR trip generation rates, and even applying ITE trip generation rates, there will be only a small increase of 4 trips on the morning peak hour and a reduction of 9 trips in the evening peak hour. Thus, Mr. Uhre's photographs of existing traffic backups on Falls Road, even if they were generally occurring, would not militate against granting this application. The clear weight of the evidence, as evaluated by all the experts in this case, including the Applicant's transportation expert and Technical Staff, is that the proposed use will not make traffic volume worse in the area, and certainly will not exceed the CLV standard for the area at the studied intersections.

b. Other Public Facilities

In addition to transportation facilities, the Hearing Examiner must determine whether schools, police and fire protection, water, sanitary sewer and storm drainage are adequate to serve the proposed facility. Evaluation of public facilities is controlled by Subdivision Staging Policies (formerly known as Growth Policies) approved by the County Council. The 2012-2016 Subdivision Staging Policy provides, at p. 21, that we "... must consider the programmed services to be adequate for facilities such as police stations, firehouses, and health clinics unless there is evidence that a local area problem will be generated." There is no evidence of inadequacy in this case, so police stations, firehouses and health clinics will be considered sufficient. The remaining four public services and facilities – schools, water, sanitary sewer and storm drainage – will be addressed below.

As noted by Technical Staff (Exhibit 61, p. 29), “The Residential Care Facility will not generate any school aged children [and] therefore, there are no potential impacts to school services [in this case].” Applicant’s civil engineer, Donald Mitchell, testified that adequate water and sanitary sewer services are available to the site. Tr. 12/3/15 58. Technical Staff agrees (Exhibit 61, p. 29), and this finding is not disputed in the record.

Stormwater management has been previously discussed in connection with environmental issues in Part II.D.2. of the Report, and based on the unrefuted evidence, the Hearing Examiner finds that to be not only adequate, but a distinct improvement over the current situation on the site.

In sum, the Hearing Examiner finds, as did Technical Staff (Exhibit 61, p. 29) that public services and facilities will be adequate to serve the proposed use.

3. No Undue Harm from Non-Inherent Adverse Effects

g. will not cause undue harm to the neighborhood as a result of a non-inherent adverse effect alone or the combination of an inherent and a non-inherent adverse effect in any of the following categories:

- i. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;*
- ii. traffic, noise, odors, dust, illumination, or a lack of parking; or*
- iii. the health, safety, or welfare of neighboring residents, visitors, or employees.*

Conclusion: This standard requires consideration of the inherent and non-inherent adverse effects of the proposed use on nearby properties and the general neighborhood. Inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use necessarily associated with a particular use, regardless of its physical size or scale of operations.”

Zoning Ordinance, §1.4.2. Inherent adverse effects, alone, are not a sufficient basis for denial of

a special exception. Non-inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use not necessarily associated with the particular use or created by an unusual characteristic of the site.” *Id.* Non-inherent adverse effects are a sufficient basis to deny a conditional use, alone or in combination with inherent effects, if the harm caused by the adverse effects would be “undue.”

In the subject case, the opposition alleges that the proposed use will harm the community in a number of ways, including impacts on property values; reduction of traffic safety; and interference with peaceful enjoyment of their property due to noise from, and the view of, the proposed use. The Hearing Examiner must assess whether any of these feared harms will actually occur, and if so, whether they will result, at least in part, from non-inherent adverse effects. If both of these questions are answered in the affirmative, the Hearing Examiner must then determine whether any of these purported harms are “undue” within the meaning of the Zoning Ordinance.

Technical Staff listed the following physical and operational characteristics that are necessarily associated with (*i.e.*, inherent in) a residential care facility for over 16 persons (Exhibit 61, p. 29):

- The large size of the building
- Outdoor amenity space for use by residents and visitors
- Parking facilities
- Outdoor lighting of parking and amenity spaces
- Traffic to the Site by staff, visitors and residents
- Delivery vehicles and trash trucks on the area roads
- Noise associated with deliveries and trash pick-up

Significantly, Staff concluded that the proposed use would not create any non-inherent adverse effects (Exhibit 61, p. 29):

In some situations, a use may create a non-inherent adverse effect because of situations unique to its physical location, operation or size of the proposal. Staff

does not believe the proposed size or operational use of a Residential Care Facility on the Subject Property, or the physical location of the Subject Property creates any non-inherent adverse effects. The location of the Site at the end of a public road that only serves as access to one other property, and is almost completely surrounded by a golf course and another residential care facility. This location provides ample amounts of distance and buffering from one-family residential uses and the proposed architecture of the building is very residential in character with pitched roofs, gables, dormers and fireplace features.

The Hearing Examiner finds this to be a tough call. On the one hand, the site is mostly surrounded by a golf course and other senior care facilities, as pointed out by Staff, and it has all the inherent characteristics one would expect from this type of facility. Mostly, it is those inherent characteristics that have the potential for adverse effects on the neighboring Pauls' property. On the other hand, the shape of the site is unusual (triangular); it has a stream valley buffer on one side which prevents a driveway and some equipment from being located there (*i.e.*, away from the Pauls' property); and the proposed building occupies the maximum amount of building coverage permitted in the zone (25%), making it a fairly intensive use for a single-family residential zone. On balance, the Hearing Examiner disagrees with Technical Staff on this point and finds that these site characteristics and the size of the facility proposed for the site are non-inherent characteristics which may result in denial of the conditional use, if they create undue harm to the neighbors in any of the listed areas. This conclusion is supported by the testimony of the Pauls' land planner, James Noonan (Tr. 1/15/16 197-198).

We now turn to the main assertions of harm raised by the opposition.

a. Effect on Economic Values of Abutting Properties and the Neighborhood

The Pauls produced expert testimony from a realtor, Ronald Danielian, who testified about evaluating the market price of homes with adjacent development. Tr. 12/7/15 121-181; Tr. 1/15/16 157-172. In his opinion, surrounding land uses have an impact on property prices, and the existence of the proposed facility abutting the Paul's property would reduce the potential

sales price of the Pauls' property compared to a similar property without the abutting conditional use. Tr. 12/7/15 147-151.¹³ However, Mr. Danielian admits that he has no prior experience interpreting plans and projecting out what improvements on a site would look like. Tr. 12/7/15 158. He also conceded that having the tennis club next door would also reduce the price of the Pauls' property, but not as much, in his opinion, as the proposed residential care facility because the tennis club is "not as imposing." Tr. 12/7/15 180. Even after the reduction in the height of the proposed facility on the western side (*i.e.*, closest to the Pauls' property), Mr. Danielian disagrees with the testimony of the Applicant's real estate appraiser, Donald Boucher, who opined that the proposed conditional use would have the same impact on the economic value of the Pauls' property as the existing tennis court special exception. Tr. 1/15/16 165-166. When cross-examined during his rebuttal testimony, Mr. Danielian indicated that he is not fully knowledgeable regarding the existing tennis facility, but he still thinks that the proposed building would be more impactful. He also does not believe the adjacent Manor Care facility would impact value as much. Tr. 1/15/16 170-171.

The Applicant produced expert testimony from a real estate appraiser, Donald Boucher, who testified that when doing an appraisal of property, the appraiser does consider adjacent uses, and that he "would consider the existing conditions or the proposed conditions with the new Brandywine facility to be equal in terms of their effect on the value of adjacent properties." Tr.

¹³ There was a considerable exchange throughout the hearing as to whether the inquiry should be addressed to economic value, market value or fair market value, and how to factor in the differing expertise of the competing experts (Mr. Danielian for the opposition and Mr. Boucher for the Applicant), with the Applicant's expert being qualified as a real estate appraiser and the opposition's expert being qualified as a realtor. Tr. 1/15/16 97-101; 157-165. For purposes of this hearing, the distinction between these terms is probably not consequential. Although Mr. Danielian's testimony may be couched in terms of effects on market price and Mr. Boucher's testimony is couched in terms of effects on appraised value, they are actually both addressing the same issue – the potential for adverse effects from having a conditional use next door, which the Zoning Ordinance capsulizes in the term "economic value." The Hearing Examiner will evaluate the effects on economic value because that is the standard specified in Section 59.7.3.1.E.1.g. of the Zoning Ordinance.

1/15/16 98-99. In his opinion, although such a facility next to a residential property could reduce economic value (depending on market conditions), the proposed assisted living facility would have no more of an impact on the economic value of the adjacent residential property than does the existing tennis club. Tr. 1/15/16 102, 106-107, 110. His opinion would not change when the tennis bubble is down part of the year because lights on the tennis courts would remain on till 9 PM, which might be a bigger problem than the tennis bubble. Tr. 1/15/16 102-103.

Since the competing expert testimony discussed above involves comparisons of the economic-value impacts on the Pauls' property of the existing tennis facility versus the proposed use, it is important to distinguish between this analysis and the evaluation of compatibility which is discussed in Part III.A.4. of this Report and Decision. The Hearing Examiner ruled during the hearing that he would evaluate compatibility of the proposed use with the neighborhood without reference to the existing tennis facility use on the site. Tr. 11/5/16 213-214; Tr. 12/7/15 31 and Tr. 1/15/16 171-172. In other words, the fact that the present tennis facility has a large bubble covering the tennis courts part of the year, which might arguably be viewed as incompatible with the neighborhood, cannot factor into whether the proposed use will be compatible with the neighborhood once it is built and the tennis facility is removed. The issue is not whether the proposed replacement will be more compatible than the existing use on the site, but whether the proposed use will be compatible with the neighborhood. However, there are three issues which must be evaluated on a comparative basis:

1. Whether the proposed use would alter the character of the neighborhood, as discussed above in Part III.A.1. of this Report, because one cannot evaluate whether the neighborhood would be altered without considering what is presently there;
2. How the traffic volume impacts from the new use are measured, which is done on a comparative basis, as discussed above in Part IIIA.2. of this Report; and
3. Whether the proposed new use on the site will unduly reduce the economic value

of the neighbor's property, in comparison with its present economic value, given the existing use next door. As pointed out during the hearing, that effect, if any, cannot be measured without considering the economic impact on the neighbor of the existing use on the subject site. Tr. 12/7/15 168-169 and Tr. 1/15/16 172-173.

It is conceded by the Applicant's expert in real estate appraisal that a facility such as the proposed use can reduce the economic value of a property next door, but that does not answer the crucial questions – whether there will actually be a reduction in economic value to the neighbor's property in this case, given that there are already adjacent uses (the tennis facility, the Manor Care facility and the Arden Courts facility) that also may reduce the economic value of neighboring property; whether the alleged harm would be the result of non-inherent characteristics or inherent ones; and whether any such harm is “undue” in this case.

Both Mr. Danielian and Mr. Boucher agreed that both a conditional use such as the one proposed next door and the tennis facility that currently exists next door could have a negative impact on the economic value of the Pauls' property. They disagreed on whether the effect of the proposed conditional use would be greater than the existing impact of having the existing tennis facility next door, with its large bubble part of the year and potentially lighted outdoor tennis courts the rest of the year.

Based on his review of the evidence in this case, the Hearing Examiner finds that the economic impact of the proposed use on the Pauls' property is likely to be no greater than the economic impacts of the existing tennis facility, the Manor Care facility and the Arden Courts facility, all of which are already adjacent to the Pauls' property. If there were only single-family residences adjacent to the Pauls' property, the Hearing Examiner's conclusion might have been different. In that case, all of the expert evidence would support the conclusion that establishing a residential care facility nearby might reduce economic value of adjacent single-family homes; however, with the already existing adjacent facilities, the Hearing Examiner must conclude that

the replacement of an existing impactful tennis facility with the proposed facility, designed to look residential in appearance, will not materially change the economic impacts on the Pauls' property.

Moreover, while the Hearing Examiner does not go as far as Technical Staff did in finding that all potential adverse effects from the proposed use are inherent, he does find that the potential harm to economic value of the Pauls' property in this case would be from inherent aspects of this use, a large building and associated activities. As admitted by Mr. Danielian in response to a question from the Hearing Examiner, his comments apply in general to having a residential care facility of this size next to the Pauls' residence. Tr. 1/15/16 167-168.

Finally, any potential harm from this building cannot be characterized as "undue," given the distance separating the proposed building from the Pauls' home; the residentially styled architecture; the reduction in the height of the building on the side facing the Pauls' residence; the extensive screening that will be required; the improvement in stormwater management that will benefit the Pauls' property; the restrictions on the timing of noisy activities contained in the conditions imposed by the Hearing Examiner; and the roughly equivalent harm to economic value from the existing tennis facility.

b. Effect on Traffic Safety

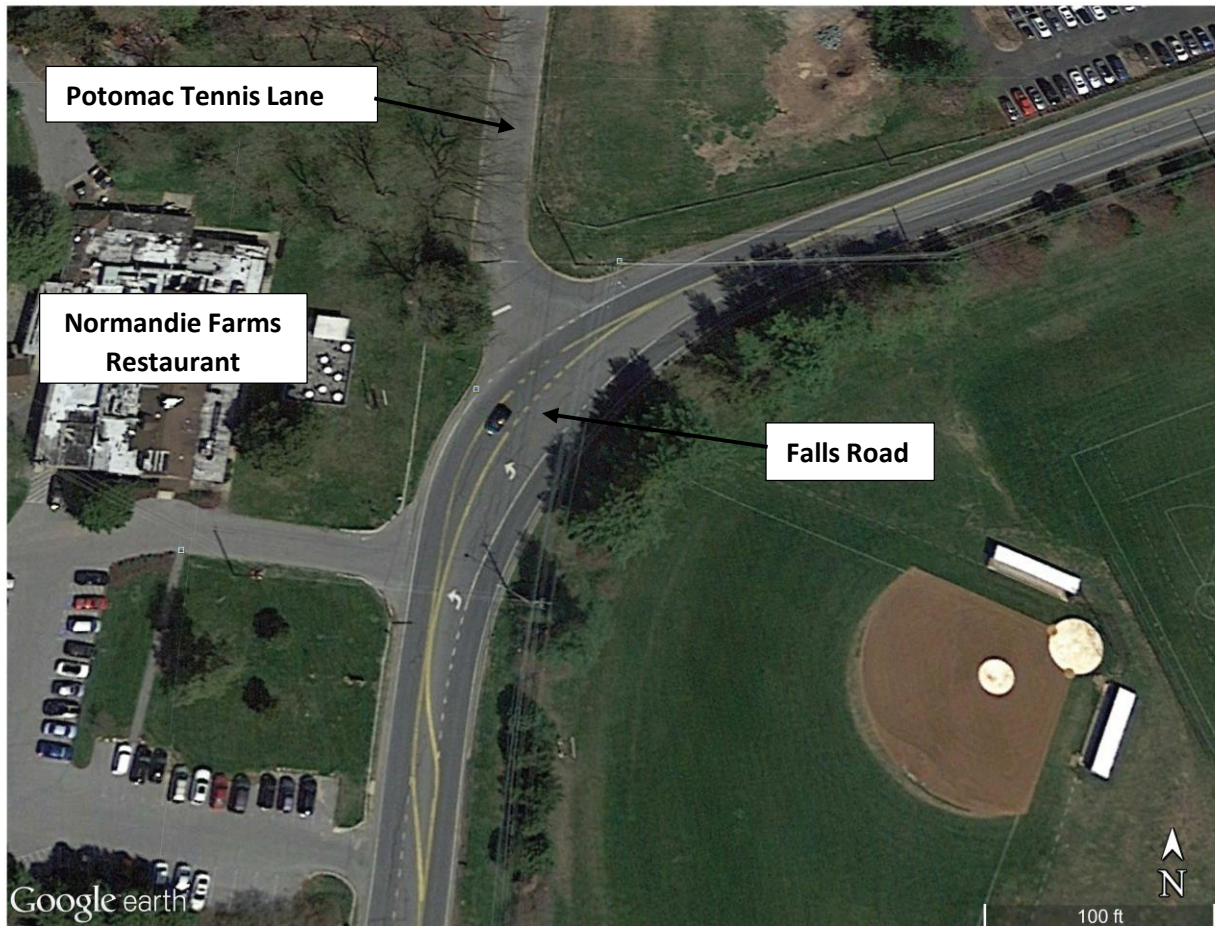
The opposition raised two safety issues in this case:

- The safety of the intersection of Falls Road and Potomac Tennis Lane; and
- Pedestrian safety in the absence of sidewalks.

(1) The safety of the intersection of Falls Road and Potomac Tennis Lane

Mr. Uhre argues that the intersection of Falls Road and Potomac Tennis Lane "is a totally unsafe intersection that can be improved and we just believe that the Applicant's use is going to

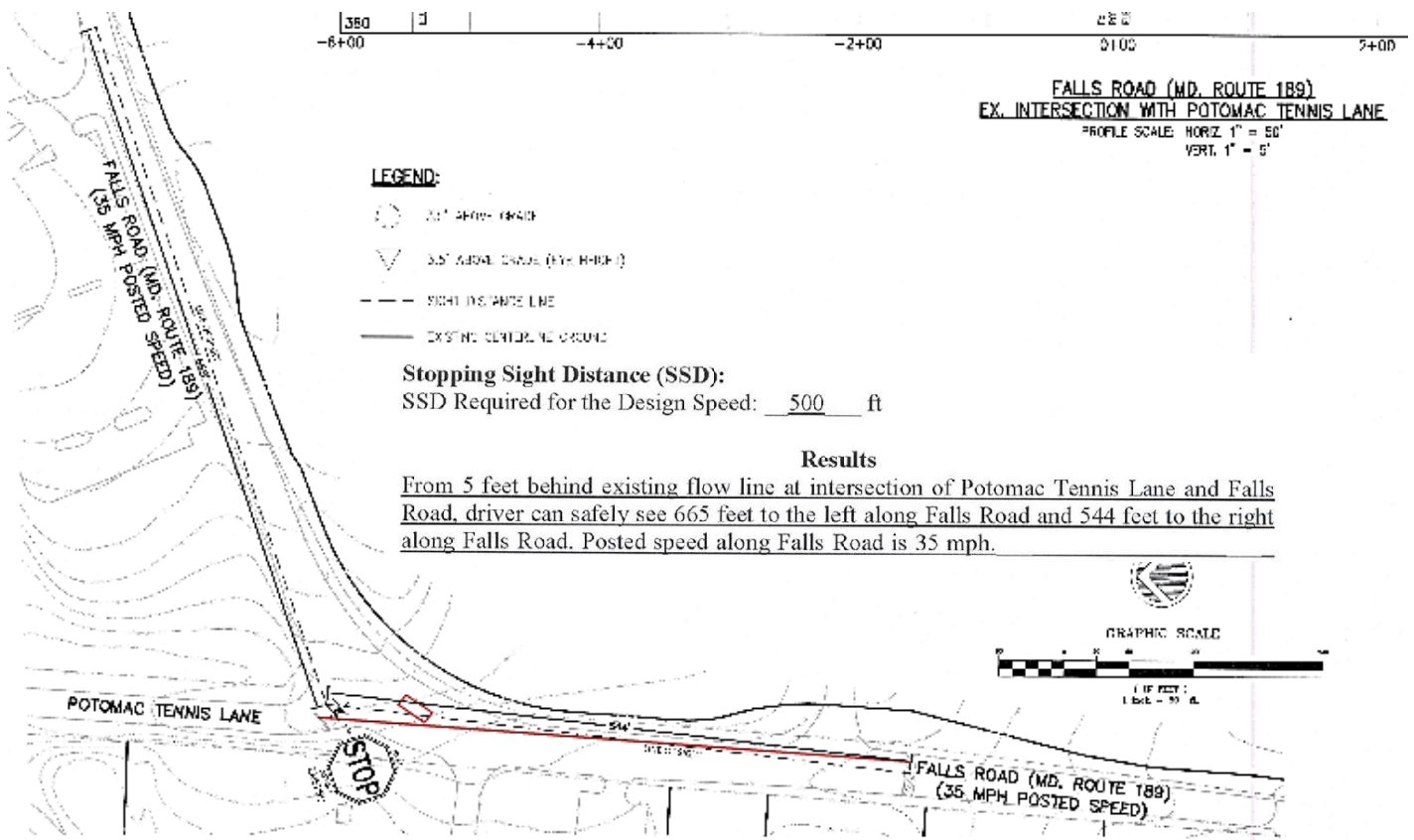
make matters even worse.” Tr. 12/7/15 37. He provided an aerial photograph of the intersection (Exhibit 112) which is informative and is therefore reproduced below.



Mr. Uhre testified that drivers coming south on Falls Road, past the Potomac Tennis Lane intersection, will sometimes run into the rocks at Normandie Farms restaurant because they have difficulty negotiating the turn in the road at the intersection. Tr. 12/7/15 41-43. Mr. Uhre also contends that the Applicant’s sight distance analysis was faulty because it allegedly did not make an adjustment for a skew in the roadway grade, and that the angle of the intersection exceeds present guidelines. Tr. 12/7/15 47-49.

The Applicant responded to Mr. Uhre’s assertions with testimony from two experts – Don Mitchell, a civil engineer, and Nancy Randall, a transportation planner. Mr. Mitchell

testified (Tr. 12/3/15 61-64) that he measured the sight distances along Falls Road in both directions and they met applicable standards, as shown in a sight-distance exhibit (Exhibit 39(i)), the relevant portion of which is reproduced below. In his expert opinion, the “skew” referred to by Mr. Uhre is depicted on the diagram and is accounted for in the sight distance calculation, even if the exact angle was not calculated. Tr. 12/3/15 68-70.



Technical Staff reviewed Mr. Mitchell's analysis and stated (Exhibit 61, p. 11):

For Staff Analysis, the Applicant submitted a sight distance plan and profile for Potomac Tennis Lane, for a vehicle waiting to access Falls Road turning either right or left (Attachment 08). The Applicant based the sight distance observations under the assumption of a vehicle sitting in the left turn lane on Falls Road, which may act to partially block visibility. According to the certified engineer plans, there is 665 feet of free and clear sight distance when looking to the left (north) and 544 feet of free and clear sight distance to the right (south). The posted speed limit of Falls Road in this area is 35 miles per hour, and the accepted minimum safe sight distance for a posted 35 miles per hour road is 250 feet of free and clear visibility.

Based on this, there is adequate sight distance in both directions for vehicles wishing to exit from Potomac Tennis Lane. There is an existing left turn lane along northbound Falls Road, at the intersection of Potomac Tennis Lane. This left turn lane has a stacking capacity of 125 feet, which provides room for up to six vehicles to stack. Because the proposed use only generates a net of four new AM peak hour trips and a net reduction in PM peak hour trips, there is not expected to be any new operational issues created at the intersection of Potomac Tennis Lane and Falls Road. {Emphasis added.}

Technical Staff additionally pointed out (Exhibit 61, Attachment 17, pp. 3-4) that “the intersection of concern for Brickyard is not the Site access, but rather an existing intersection of two public streets, that is already used under existing conditions and will remain in its current configuration whether this Application is approved or not.”

Based on Mr. Mitchell’s calculations and Technical Staff’s review, the Hearing Examiner finds that the sight distances along Falls Road meet applicable requirements. Whether or not the intersection in question meets current guidelines for designing an intersection is not within the purview of this review because the evidence establishes that the proposed use will not be creating any new operational issues at the intersection, as observed by Technical Staff.

This conclusion is buttressed by the testimony of Applicant’s transportation planner, Nancy Randall, who stated that, based on crash data collected by the Maryland State Highway Administration (SHA), there has been only one accident at or near the intersection of Falls Road and Potomac Tennis Lane over the entire three-year study period from 2012 through 2014.¹⁴ Tr. 12/3/15 161-163. Ms. Randall concluded that the proposed use would not have any detrimental effect on vehicular or pedestrian traffic or safety. Tr. 12/3/15 167. In its presentation to the Planning Board (Exhibit 74(a), p. 17), Technical Staff noted that “Accident data collected by

¹⁴ Mr. Uhre had raised an objection alleging that traffic accident data had not been made available to him earlier in the case. Technical Staff responded to Mr. Uhre’s allegation by email of October 9, 2015 (Exhibit 58), asserting that the traffic accident data had in fact been released and made public. The Hearing Examiner holds that all parties had access to this information far enough in advance of the hearing to allow for timely preparation. Tr. 12/7/15 34-37.

MDSHA for 2012 – 2014 for a 0.68 mile segment of Falls Road shows a total of 14 accidents reported, with only one at the intersection of Falls Road and Potomac Tennis Lane.” [Emphasis added.]

Based on this record, and in the absence of any expert testimony refuting the experts’ conclusions that the proposed use will not reduce traffic safety, the Hearing Examiner so finds.

(2) Pedestrian safety in the absence of sidewalks.

Another issue raised by Mr. Uhre is the absence of sidewalks along Falls Road from the bus stop located at Bullis School up to Potomac Tennis Lane. Tr. 12/7/15 53-57. He argues that the lack of sidewalks reduces pedestrian safety.

The Applicant’s transportation planner testified that “Pedestrian sidewalks and pathways are provided throughout [the subject site].” Tr. 12/3/15 168.

Technical Staff addressed the sidewalk issue in the body of its report (Exhibit 61, p. 12) and in its Attachment 17 at p. 4. In its main report, Technical Staff stated:

There are no existing sidewalks located along Potomac Tennis Lane, and the closest segment of existing sidewalk on Falls Road is located near the intersection of Eldwick Way, at the northeastern corner of the local neighborhood and over 3,500 feet from the Subject Property. The Washington Metropolitan Area Transit Authority does provide Metro Bus service (Route T-2) along the Falls Road corridor, however it runs infrequently at 20 minutes during peak periods and 30 minutes at other times. Also, the closest bus stop is over 1,100 feet from the Subject Property near the entrance to the Bullis School. There is inadequate right-of-way along Falls Road in front of the properties between Potomac Tennis Lane and the existing bus stop to install a sidewalk along Falls Road without property condemnation. Given the lack of existing sidewalk connections in the neighborhood, the lack of destinations to walk to, the inadequate right-of-way, and the private transportation services provided by the Application, Staff does not believe it is reasonable to ask this Applicant to provide off-site sidewalks at this time along Potomac Tennis Lane or Falls Road.

In Attachment 17, Staff added:

Brickyard also indicates that the lack of existing sidewalks within the defined neighborhood creates a non-inherent adverse impact. Staff does not believe there is anything unique about having incomplete sidewalk connectivity in areas Zoned RE-2, or in areas primarily built prior to current standards that may have required sidewalks (or otherwise in areas that other residential care facilities may be locating as in-fill). This deals with existing conditions well removed from the Subject Property, and the amount of off-site sidewalk that would need to be constructed to connect to any pedestrian generating use is not appropriate for the Applicant to take on with this Application.

The Planning Board considered this issue, and in lieu of recommending a sidewalk, it accepted the Applicant's offer to provide an employee shuttle service to either the local bus stop or to a Metro station. Exhibit 74, p. 2.

While sidewalks along Falls Road might provide additional safety for pedestrians, the Hearing Examiner agrees with Technical Staff and the Planning Board that it would not be appropriate to impose that obligation on an applicant for a conditional use that will be located at the end of Potomac Tennis Lane, about 600 feet away from Falls Road and another 400 feet from the bus stop in question. A condition will be imposed in Part IV of this Report and Decision requiring the Applicant to provide an employee shuttle service to either the local bus stop or to a Metro station, as suggested by the Planning Board.

c. Effects on Peaceful Enjoyment from Noise

One of the main concerns raised by the opposition in this case was that operation of the proposed use will create noise that will disturb the Pauls' peaceful enjoyment of their property. To buttress this argument, the Pauls introduced testimony from an acoustical engineer, Gerald Henning. Tr. 1/15/16 175-191. Mr. Henning testified that even with the revised plans, some of the noise sources, trucks with backup alarms and possibly the generator and the chiller, will likely create noise levels that will not comply with the Montgomery County noise ordinance. Tr. 1/15/16 177.

Applicant's expert in acoustical engineering, Scott Harvey, admitted that there might be difficulty in meeting the noise ordinance near the truck turn-around on the western edge of the site, but he suggested that trash trucks might be exempt from ordinary noise regulations under COMCOR §48.00.02, which controls the refuse collection. Tr. 1/15/16 117-118. Nevertheless, he concluded that there would not be any significant adverse noise impacts from the conditional use. Tr. 1/15/16 118. In Mr. Harvey's opinion, all the mechanical equipment (*i.e.*, the generator and the chiller) can be designed to comply with the noise ordinance. Tr. 1/15/16 124.

Technical Staff recognized that "[t]here may be potential noise impacts from deliveries and trash pick-up." Exhibit 61, p. 30. However, Staff noted that both will be limited to three occurrences a week and there will be evergreen trees and a stone wall enclosure to enhance the screening already provided by the existing trees. Given those facts, Staff did not feel that the noise issues vitiated compatibility. Moreover, Staff's evaluation of potential noise impacts predated the December 2015 revisions to the plans, which, *inter alia*, relocated the proposed trash enclosure further from the property line shared with the Pauls' property and modified the vehicle turn-around in a way that pulls the pavement further away from the property boundary. Technical Staff evaluation of the revised plans noted, "This new layout provides room for additional landscaping and a larger masonry screening wall between the turnaround and the residential property to the west." Staff concluded, "The additional screening of the proposed structures and vehicles from the neighboring properties enhances compatibility." Exhibit 133.

Based on this record, the Hearing Examiner finds that the proposed conditional use, with the hours of trash pickup and food deliveries along the western driveway restricted by a condition in Part IV of this Report and Decision, will not create undue harm to the Pauls or any other neighbors due to noise. It must be remembered that food deliveries, trash removal, HVAC

equipment and periodic testing of generators are inherent characteristics of this type of use. The resulting noise must be kept within County noise standards, and the Hearing Examiner will make that a condition of the use. Violations can be reported to the appropriate County authorities for enforcement. We all live with the necessary evil of trash truck noises, and the Hearing Examiner concludes that three food deliveries and three short-lived trash truck visits a week, restricted to after 9 AM, will not create an undue harm to the neighbors, considering that the closest home is almost a football field away from the source of the noise. All other deliveries will come to the front of the building. Tr. 1/15/16 132-133.

In sum, the Hearing Examiner finds that the proposed use will not cause undue harm to the neighborhood as a result of a non-inherent adverse effect alone or the combination of an inherent and a non-inherent adverse effect in any of the categories listed in Zoning Ordinance §59.7.3.1.E.1.g. There was no evidence that the proposed use would produce any harm from odors or dust. The issues of illumination and parking will be discussed in connection with the General Development Standards, reviewed in Part III.D. of this Report and Decision. The issue of compatibility of this building with the neighborhood will be discussed immediately below.

4. Compatibility with the Neighborhood

2. Any structure to be constructed, reconstructed, or altered under a conditional use in a Residential Detached zone must be compatible with the character of the residential neighborhood.

Conclusion: Zoning Ordinance §59.7.3.1.E.2. requires an examination of the compatibility of the use with the character of the residential neighborhood in which it is located. This question is similar to the one raised by Zoning Ordinance §59.7.3.1.E.1.d., above, which asked whether the proposed use will be harmonious with the neighborhood or would alter its character. In response to that question, the Hearing Examiner found that the proposed use would not alter the character

of the neighborhood, considering the predominant uses in the immediate vicinity of the subject site, including the existing use on the site – a tennis facility.

However, in answering the compatibility question raised by §59.7.3.1.E.2., the Hearing Examiner will not consider the existing use on the site because it will be gone if the subject application is approved. Thus, the question of compatibility is not exactly the same as the question of whether the neighborhood's character will be altered by the proposed use, the question which was posed by §59.7.3.1.E.1.d. As mentioned in connection with the discussion of economic value impacts under by §59.7.3.1.E.1.g., the Hearing Examiner ruled during the hearing that he would evaluate compatibility of the proposed use with the neighborhood without reference to the existing tennis facility use on the site. Tr. 11/5/16 213-214; Tr. 12/7/15 31 and Tr. 1/15/16 171-172. In other words, the fact that the present tennis facility has a large bubble covering the tennis courts part of the year, which might arguably be viewed as incompatible with the neighborhood, cannot factor into whether the proposed use will be compatible with the neighborhood once it is built and the tennis facility is removed. The compatibility question is not whether the proposed replacement will be more compatible than the existing use on the site, but whether the proposed use will be compatible with the remaining neighborhood after the existing use is replaced.¹⁵

Even without reference to the existing tennis facility, the particular residential neighborhood in question is somewhat unusual in that it is dominated, at least in the immediate vicinity of the subject site, by uses that are distinctly not single-family residential in character – a nursing home (Manor Care); an assisted living facility (Arden Courts); and a golf course (Falls

¹⁵ As noted in the earlier discussion, the three occasions when the existing use on the site must be considered were in evaluating whether the new use would alter the character of the neighborhood; the measurement of traffic volume increases, if any, from the new use; and the comparison of economic values in the neighborhood before and after the proposed use replaces the existing use.

Road Golf Course). The only single-family residential use abutting the subject site is the Pauls' residence, which fronts on Lockland Road, to the west of the site. Two other major non-residential uses are also in the defined neighborhood, the Normandie Farms restaurant, just to the south of the Manor Care facility, and the Bullis School, located just across Falls Road from the golf course. While a significant portion of the neighborhood to the west of the site is occupied by single-family residences, they clearly are not the predominant part of the existing neighborhood, especially in the immediate vicinity of the subject site. Moreover, the proposed use is architecturally designed to look residential in character, as shown in the architect's rendering (Exhibit 79(f)(i)) reproduced on page 17 of this Report and Decision, and as described by Applicant's architect, Hal Bolton, at the hearing (Tr. 11/6/15 231):

It's designed in an English Tudor style which is as similar to many of the residences in the Potomac neighborhood. We've used many residential features, such as the chimney pods, the rooftop cupola, Tudor detailing, residential windows. We have copper trim along the roof edge. Architectural shingles. And we have chosen to break up the façade of the building utilizing bays, in this case to the left and right of the front door. These wings then step back and angle back from the building, breaking up the mass of the building. We have these smaller octagonal rooms to the left and the right, which again break up the mass, differentiate the rooftop at this level from the main roof over the entry. And so we've made a conscious attempt throughout the building to vary both the horizontal and vertical shape of the facility.

Technical Staff agreed, stating (Exhibit 61, p. 7):

. . . The structure is designed to be residential in appearance with various architectural details including a pitched roof, dormers and masonry fire places and chimneys and stone clad exterior walls. These architectural elements wrap around the entire building façade for a cohesive look from all directions.

It is clear to the Hearing Examiner that the proposed use, a residential care facility designed with residential style architecture, is not out of character with this neighborhood, and he so finds.

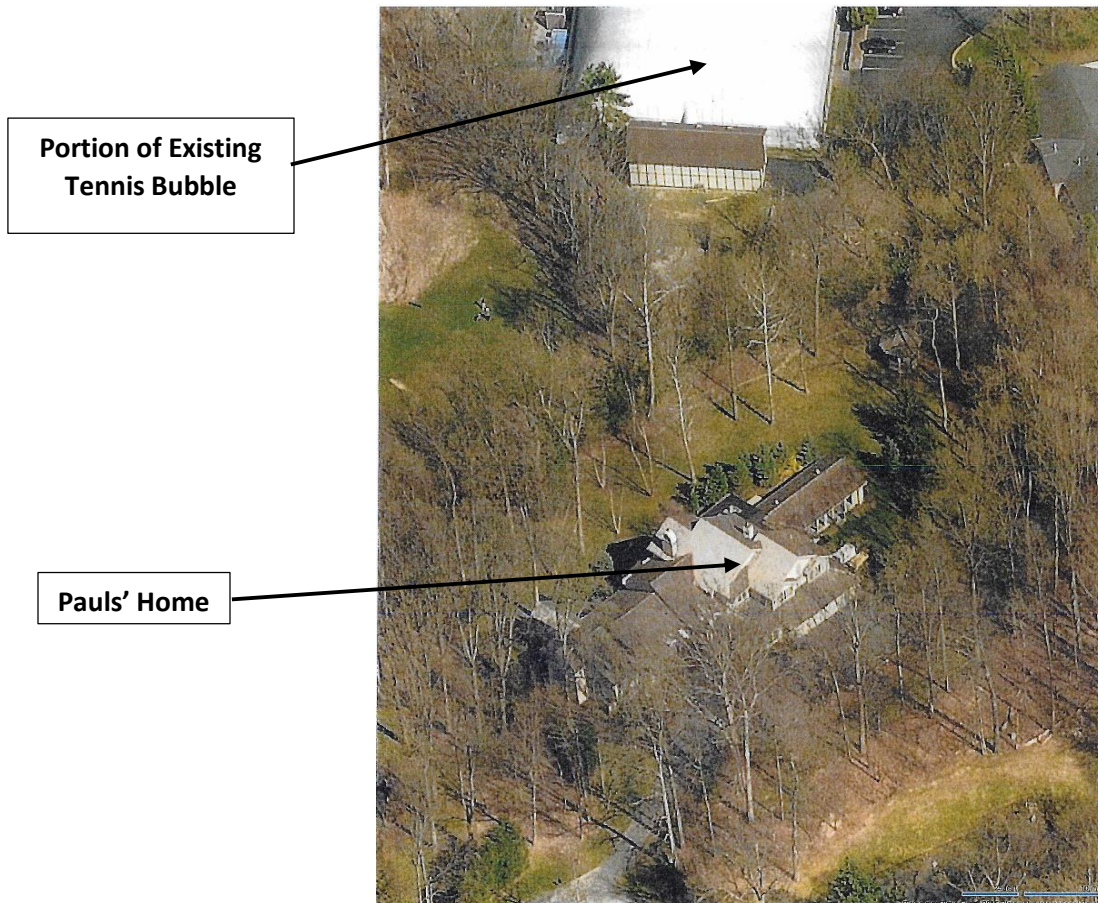
Nevertheless, this general evaluation of compatibility with the character of the neighborhood does not end the inquiry, for we must still determine whether the proposed conditional use, in its revised format, will be compatible with the immediate neighbors, especially the Pauls' property, the Pauls being the only immediate neighbors to oppose this application. This discussion mostly addresses their view of the proposed building since the impacts of other characteristics (*e.g.*, stormwater management, noise, traffic, economic value, parking and illumination) are discussed elsewhere in this Report. The issue of whether any "undue harm" will result to the Pauls or any other neighbors of the subject site is discussed above in connection with Section 59.7.3.1.E.1.g., and the Hearing Examiner found no undue harm will be caused by the characteristics listed in that section.

The opposition argues that the proposed building will be visible to the Pauls from their home and thereby renders the proposed use incompatible with their use. Their land planner, James Noonan, testified that the proposed building, even as revised, would not be compatible with the Pauls' property. Tr. 1/15/16 192-194.

I believe it is not compatible with the Pauls' property. . . We could start with the, the structure itself since that's some, somewhat been addressed. Back in December, I believe we showed some photographs at that time which showed the visibility of existing structures with a leaf-off condition which is the kind of conditions you have right now. It's at least a third, maybe more of the year. The, the existing structure, even though it's 30 feet further back on the lot is also eight, six to eight feet higher in terms of the base elevation. You will be able to see that still from the Pauls' property even, even the ground level or close to it despite the reduction in overall height. In addition, one of the things that hasn't really been, been addressed here is, is, and, and I'm just going to say this. Not that I want to compare it to existing conditions, but to, to talk about the impact of new lights and, and things on the Paul property. The existing storage shed in fact blocks the light from, from the, the, the bubble, the tennis bubble. And if you again look back at the photographs we took, and I can give you the, the numbers, you see very little of the, those, those lighted structures from the Paul property. That obviously, that structure obviously is going to be gone and now you're going to be able to see the, the new structure pretty clearly and whatever lighting occurs from that. So, that, that's, that's the first thing. So the bulk of the building is still, is, is visible from the Pauls' residence and

still it's a fairly bulky structure when it's, during leaf-off conditions you'll be able to see it quite easily.

The Pauls introduced an aerial photo (Exhibit 99(a)) which depicts their property and a portion of the smaller tennis bubble to the east. It also shows the existing trees in the “leaf-off” condition referenced by Mr. Noonan:



Not surprisingly, the Applicant’s experts disagreed with Mr. Noonan’s conclusion. Joshua Sloan, Applicant’s land planner, testified that the proposed building would be compatible with the Pauls’ property, even without considering the later revisions in which the side facing the Pauls’ property was reduced in height by one floor. Tr. 11/6/15 157, 168-170. Mr. Sloan observed that the homes in the area, given their peaked roofs, were generally “two and a half stories” tall. Tr. 11/6/15 219-220. Hal Bolton, Applicant’s architect, shared Mr.

Sloan's view. Tr. 11/6/15 248. As noted by Mr. Bolton, "Many of the homes in the neighborhood . . . reach up similar in height to where this building is. So I, I feel like our building is not significantly taller than, than many of the surrounding homes." Tr. 11/6/15 238.

Technical Staff responded to the compatibility issue raised in §59.7.3.1.E.2, with the following comment (Exhibit 61, p. 30):

The primary building, and decorative pergola and gazebo structures proposed for the Site will be compatible with the character of the existing neighborhood. The adjacent use and structures to the South is another residential care facility and a separate nursing facility, comprised of two buildings that are one and two stories tall that are constructed with a similar sized footprint. The development on that neighboring site sits about 10 feet higher than the Subject Property, making the top elevation of the neighboring facility similar to that proposed by the Application. A 20 foot landscaped area is proposed between the proposed building and this neighboring property and the use immediately over the property boundary is mostly a parking lot and the short end of the nursing home. The similarity of uses, building scale and landscaping combined will not create a compatibility issue to the south. To the east and north is the Falls Road golf course with the Subject Property buffered by trees and fairways. The nearest residential uses to the north or east are over 1,400 feet away from the Site boundary and will not be impacted by the Application. There is one, one-family detached house located to the west of the Site. This is a single family, multi-story house and the lot is predominantly wooded. The portion of the Site that most immediately abuts this property is where the proposed structure steps down a level and has structured parking under the primary use. This is also near the turn-around for delivery and emergency vehicles and where the trash enclosure will be located. There may be potential noise impacts from deliveries and track pick-up, however, the statement of operations in the Application said both will be limited to three occurrences a week. The Application is proposing evergreen trees and a stone wall enclosure to enhance the screening already provided by the existing trees. Given the above analysis, Staff believes the Application is compatible with the character of the residential neighborhood.

The Planning Board generally agreed with the analysis of compatibility in the Technical Staff report, stating (Exhibit 74, p. 1):

As part of the discussion, the Planning Board raised some concerns over the compatibility of the proposed structure and the access alley along the southern property boundary as it relates to Dr. and Mrs. Paul's property. The Planning Board found that the distance between the Paul's house and the site, in conjunction with the proposed landscaping was adequate to find this Application visually compatible with the Paul's property.

While the Hearing Examiner understands that the Pauls' opposition is heartfelt, that does not mean that their fears will be realized or that they reflect the actual impacts of the proposed structure, as modified through the hearing process. The Pauls' home is much closer to one of the existing Manor Care structures, the one-story Arden Courts Assisted Living Facility (137 feet),¹⁶ than it will be to the proposed Brandywine structure (287 feet). Although the Arden Courts building is not as tall as the proposed structure, the proposed building will be twice the distance from the Pauls' home. Moreover, the Pauls' home is about 300 feet from the main Manor Care building (Exhibit 106), which is described in the record as two and three stories tall in some parts. Tr. 11/6/15 184. The relationships among these facilities can be seen below in a Google aerial photograph (Exhibit 94), which also shows the existing vegetative screening.¹⁷



¹⁶ The distance from the Pauls' home to the Arden Courts building was estimated as 60 feet by Applicant's land planner (Tr. 11/6/15 185-186), but that is actually the distance from the Arden Courts building to the Pauls' property line. A more accurate measure of the distance from the Arden Courts building to the Pauls' home (137 feet) can be found on an aerial photograph (Exhibit 106). In contrast, the distance between the Pauls' home and the proposed building, as revised, is shown as 287 feet on the "Extended Site Section Comparison" (Exhibit 124(c)).

¹⁷ The Hearing Examiner violated his usual policy of orienting the photo with north pointing up because the perspective with the south on top makes it easier, in this case, to see the vegetation screening the Pauls' home.

It is worthy of note that the Board of Appeals faced the same sorts of objections to the Manor Care special exception as the ones raised in this case to the present application, and found that it would be compatible with the neighborhood, even though the Board recognized that the corner of the assisted living center would be only 60 feet from the Pauls' property line (Lot 7 of the Potomac Glen Subdivision). *See* Board of Appeals Opinion approving the Manor Care special exception (No. S-1289) in 1986 (Exhibit 93, p. 10).

The Hearing Examiner will also respond to some of the assertions made by the Pauls and their counsel relating to rulings made during the hearing. Dr. Paul's affidavit of February 19, 2016 (Exhibit 164(b)) misconstrues the Hearing Examiner's efforts during the hearing to encourage the Applicant to modify its plans. Though they were "well intentioned," as Dr. Paul admits, they were not aimed at either "making compromises" or "appeas[ing] everyone" as Dr. Paul suggests. Rather they were aimed at reducing any potentially adverse impacts the proposed use might have on the Pauls, and that is exactly what they have accomplished. It must be remembered that both the Technical Staff and the Planning Board (Exhibit 74) found that the proposed facility would be compatible with neighboring uses even without the changes requested by the Hearing Examiner and agreed to by the Applicant. These included relocating a stormwater facility away from the property line and placing it underground; moving the trash enclosure 37 feet further from the Pauls' property line; and most importantly, reducing the height of the proposed facility by removing the third floor on the western side, closest to the Pauls' property. The Technical Staffer who analyzed this case, Benjamin Berbert, was called as a witness by the Pauls, and Mr. Berbert testified that the proposed changes, especially to the height of the building, made the proposed use "even a more compatible design than what was originally presented to us and to the Planning Board." Tr. 1/15/16 150.

Contrary to the suggestion of the Pauls' attorney, William Chen (Exhibit 164, p. 4), the Hearing Examiner never, as Mr. Chen put it, "recognized that the original plan was defective." Rather, he inquired of the Applicant whether changes could be made to reduce any possible impacts on the Pauls. Tr. 259-260. Compatibility of the original plan is clearly arguable, and there was competing expert evidence at the hearing about that issue. However, as noted, both Technical Staff and the Planning Board found the proposed facility, even as originally presented at the OZAH hearing (*i.e.*, before the December 2105 modifications) to be compatible with its surroundings.

The Pauls argue that (Exhibit 164, p. 4):

The revisions proposed in piecemeal fashion by the applicant have not addressed the underlying problem with the proposed conditional use. The current iteration of the conditional use is as defective as was the original proposal. Simply stated, the bulk and density of the conditional use, even after the piecemeal changes, overwhelms a very challenging site. The site configuration challenges are further complicated by the inclusion of a forest conservation area on the north side of the site that forces most of the operational and intrusive functions of the proposed conditional use to the southwest side of the property next to the Paul property. None of the changes proposed by the applicant changes the overbearing impacts of the proposed use on the Paul property. Those impacts completely overwhelm any benefit to the Pauls resulting from the revisions made to the proposal by the applicant.

The Hearing Examiner disagrees, based on the weight of the evidence, including all of the testimony of the witnesses and the opinions of the Technical Staff and the Planning Board. At the very least, he finds the proposed use, in its modified form (*i.e.*, with the third floor removed on the side closest to the Pauls' property; with the trash enclosure moved further away from the Pauls' property than in the original plans approved by Technical Staff and the Planning Board; with the reconfiguration of the stormwater management facility to an underground structure; and with the improvements that stormwater management will confer on the area), to be compatible with the Pauls' property.

The Hearing Examiner did not find it necessary to impose height, density, coverage, and parking standards greater than the minimums required by the Zone, as he is empowered to do by Zoning Ordinance §59.3.3.2.E.2.c.ii.(i), because the only area of compatibility concern, in the opinion of the Hearing Examiner, is the abutting property owned by the Pauls to the west of the site, and the Applicant has voluntarily reduced the height of the building in the critical area on the west side adjacent to the Pauls' property and has made the other changes discussed above to reduce potential impacts on the Pauls' property.

As previously mentioned, the Hearing Examiner finds that the proposed use, as modified, is also compatible with other surrounding uses. The other abutting neighbors on three sides are not single-family residential. They are the Manor Care and Arden Courts facilities to the south and southwest and the Falls Road golf course to the north and east. There is no evidence that those uses will be adversely affected by the proposed residential care facility on the subject site.

Finally, Mr. Chen suggests in his letter of February 19, 2016 (Exhibit 164, p. 2) and in a previous letter (Exhibit 140) that somehow the Hearing Examiner has created a process that is "not fair" because he allowed changes to the plans in the course of the hearing and because he noted that the Council, in determining that this type of use could be allowed as a conditional use, balanced the desirability of the type of use against the possible adverse impacts to neighbors that might be created. Tr. 12/7/16 262-266. The Hearing Examiner responded directly to these concerns in an on-the-record email to the parties (Exhibit 141(a)), quoting the Maryland Court of Appeals in *Montgomery County v. Butler*, 417 Md. 271 at 296 (2010),

. . . the essence of a special exception is a legislative determination that certain uses will be permissible (albeit with the grant of a special exception), notwithstanding the likelihood of adverse effects naturally associated with such uses. . . .

Thus, when the Council determines that a class of uses, in this case residential care facilities, should be allowed as a conditional use, it is making an implicit determination that such uses are desirable for the County even though they may have some inherent adverse effects on the neighborhood. However, when it is demonstrated at the hearing that the adverse impacts are not inherent in the use, or the combination of inherent and non-inherent adverse effects would cause an “undue harm to the neighborhood,” Zoning Ordinance §59.7.3.1.E.1.g. provides for the denial of the conditional use. In the subject case, the Hearing Examiner found that no undue harm would result from the proposed use.

In sum, the Hearing Examiner finds that the proposed use, as represented in the revised plans filed by the Applicant in December of 2015, will be compatible with the surrounding neighborhood, including the Pauls’ home. There will be some view of the building from the Pauls’ property, but it will be almost a football field away from the Pauls’ home, extensively screened by vegetation, and designed to appear residential, with the side facing the Pauls’ home being only two stories tall.

3. The fact that a proposed use satisfies all specific requirements to approve a conditional use does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require conditional use approval.

Conclusion: The application satisfies all specific requirements for the conditional use, and with the conditions imposed to mitigate adverse impacts, meets the standards required for approval.

B. Development Standards of the Zone (Article 59.4)

In order to approve a conditional use, the Hearing Examiner must find that the application meets the development standards of the RE-2 Zone, contained in Article 59.4 of the Zoning Ordinance.

Conclusion: Staff included a table comparing the minimum development standards of the RE-2 Zone to what is provided on the conditional use site plan. Exhibit 61, pp. 9-10.

Development Standards Table		
<i>for a Residential Care Facility (over 16 persons) in the RE-2 Zone</i>		
	<i>Required</i>	<i>Proposed</i>
Lot and Density		
Lot Area		
RE-2 Zone, Standard	2 acres	4.02 acres
Residential Care Facility (over 16 persons)(Division 3.3.2.E.2.c.ii(d)2)	1,200 sq. ft. / bed 3.86 acres	4.02 acres
Lot width and front building line	150 ft.	553 ft.
Lot with at front lot line	25 ft.	100 ft.
Density		
RE-2 Zone, Standard	0.5 units/acre	N/A
Residential Care Facility (over 16 persons)(Division 3.3.2.E.2.c.ii(d)2)	1,200 sq. ft. / bed	1,250.8 sq. ft. / bed
Lot Coverage	25% max (43,736 sq. ft.)	25% (43,736 sq. ft.)
Placement		
<u>Principal Building</u>		
Front	50 ft.	85 ft.
Side Setback		
RE-2 Zone, standard	17 ft.	N/A
Residential Care Facility (over 16 persons) (Division 3.3.2.E.2.c.ii(e))	20 ft.	25 ft.
Sum of side setbacks	20 ft.	50 ft.
Rear setback	35 ft.	50 ft.
<u>Accessory Structures</u>		
Front	80 ft.	80 ft.
Side Setback	15 ft.	15 ft.
Side street setback, abutting lot fronts on the side street and is in a Residential Detached Zone	50 ft.	N/A
Side street setback, abutting lot does not front on the side street or is not in a Residential Detached Zone	20 ft.	N/A
Rear setback	10 ft.	10 ft.
Height (max)		
Principal Building	50 ft.	50 ft.
Accessory structures	50 ft.	12 ft.

Technical Staff concluded (Exhibit 61, p. 9), “Based on the results of the development standards table, Staff finds the Application meets or exceeds all required development standards for developing a Residential Care Facility (over 16 persons) in the RE-2 Zone.” There is no credible evidence to contradict Staff’s conclusion, and the Hearing Examiner finds that the proposed facility will meet the development standards of the RE-2 Zone.

C. Use Standards Specific to a Residential Care Facility (Section 59.3.3.2.E.2.c.)

The specific use standards for approval of a residential care facility are set out in Section 59.3.3.2.E.2.c. of the Zoning Ordinance.

c. Residential Care Facility (Over 16 Persons)

i. Where a Residential Care Facility (Over 16 Persons) is allowed as a limited use, and the subject lot abuts or confronts a property zoned Agricultural, Rural Residential, or Residential Detached that is vacant or improved with an agricultural or residential use, site plan approval is required under Section 7.3.4.

Conclusion: This provision is inapplicable because the proposed facility is being allowed as a conditional use, not a limited use.

ii. Where a Residential Care Facility (Over 16 Persons) is allowed as a conditional use, it may be permitted by the Hearing Examiner under Section 7.3.1, Conditional Use, and the following standards:¹⁸

(a) The facility may provide ancillary services such as transportation, common dining room and kitchen, meeting or activity rooms, convenience commercial area or other services or facilities for the enjoyment, service or care of the residents. Any such service may be restricted by the Hearing Examiner.

Conclusion: Technical Staff reports (Exhibit 61, p. 18):

The Application does include indoor services and amenities for residents, including a salon and spa, music room, pub, and restaurant style dining. These uses are designed to serve the residents and are all internal to the structure. The Application

¹⁸ The only relevant subsections are Sections 59.3.3.2.E.2.c.ii.(a), (d), (e) and (i). Subsections (b), (c), (f), (g), (h), and (j) are not applicable to the proposed use.

is also providing a by appointment concierge service and will have one private bus for transporting residents during group activities.

The Hearing Examiner sees no basis in this record for restricting any of the activities or services to be provided to the residents by the Applicant, as they will have virtually no impact on the surrounding community.

(d) Where facility size is based on the number of beds, not dwelling units, the following lot area is required:

* * *

(2) In all other zones, the minimum lot area is 2 acres or the following, whichever is greater:

(i) in RE-2, RE-2C, RE-1, and R-200 zone: 1,200 square feet per bed;

Conclusion: The proposed facility would have 140 total beds. At 1,200 square feet per bed, as required in this section, the minimum lot area required would be 168,000 square feet (1,200 X 140 = 168,000). The lot area of the subject site, as reported in Exhibit 131(a), is 174,941 square feet (approximately 4.02 acres), which is more than the stated minimum requirement. Thus, the Hearing Examiner finds that this standard has been met.

(e) The minimum side setback is 20 feet.

Conclusion: The conditional use site plan (Exhibit 131(a)) indicates that the side setback is 45 feet; however, Technical Staff reports that the side setback from the nearest adjacent property is 25 feet. The Hearing Examiner accepts Staff's determination and finds that the smallest side setback is 25 feet, which is compliant with the 20-foot minimum prescribed in this section.

(i) Height, density, coverage, and parking standards must be compatible with surrounding uses; the Hearing Examiner may modify any standards to maximize the compatibility of the building with the residential character of the surrounding neighborhood.

Conclusion: The Hearing Examiner evaluated compatibility with surrounding uses in his discussion of the compatibility finding required by §59.7.3.1.E.2. That discussion is

incorporated herein. As stated there, the Hearing Examiner finds that the proposed use, as represented in the Conditional Use Plan (Exhibit 131(a)) and the other revised plans filed by the Applicant in December of 2015, will be compatible with surrounding uses.

D. General Development Standards (Article 59.6)

Article 59.6 sets the general requirements for site access, parking, screening, landscaping, lighting, and signs. Under the amendments to Section 59.7.3.1.E.1.b. of the new Zoning Ordinance, effective December 21, 2015, the requirements of these sections need be satisfied only “to the extent the Hearing Examiner finds necessary to ensure compatibility.”¹⁹ The applicable requirements, and whether the use meets these requirements, are discussed below. Technical Staff found that “. . . the following Sections apply: Division 6.2 Parking, Queuing and Loading, Division 6.4 General Landscaping and Outdoor Lighting, Division 6.5 Screening, and Division 6.7 Signs. . . . The proposed use and Zone do not require the review of Division 6.1 for Site Access, Division 6.3 Open Space and Recreation, or Division 6.6 Outdoor Storage.” Nevertheless, because the Technical Staff proposed a condition affecting access to the site, the Hearing Examiner will briefly address that issue below.

1. Site Access

Section 6.1.2. Applicability

Division 6.1 applies to development in the Residential Multi-Unit, Commercial/Residential, Employment, Industrial, and Floating zones if:

- A. an apartment, multi use, or general building type is proposed; and*
- B. a site plan or conditional use approval is required.*

Conclusion: Zoning Ordinance Division 59.6.1. governs Site Access; however, by its own terms, as stated in §59.6.1.2., Division 59.6.1 does not apply to development in single-family residential

¹⁹ The 2014 Zoning Ordinance for Montgomery County, adopted September 30, 2014 (Ordinance No. 17-52), was amended effective December 25, 2015, in ZTA 15-09 (Ordinance No. 18-08, adopted December 1, 2015).

zones, such as the RE-2 Zone involved in this case. Nevertheless, Technical Staff observed that the existing terminus of Potomac Tennis Lane will not be sufficient to serve the proposed use (Exhibit 61, pp. 11-12):

The existing terminus of Potomac Tennis Lane is currently a dead end, with access on the left for the existing Tennis Club, and a driveway off the end for maintenance vehicles for the golf course. MCDOT standards for a proper public street terminus is generally a cul-de-sac, shown in standard MC-222.01, however there is limited available right-of-way to construct that improvement and the right-of-way that would be required would need to primarily come from the golf course rather than the Applicant. Also, the Subject Property is already a recorded lot therefore future submission of a Preliminary Plan of subdivision is not required. The Applicant has coordinated with MCDPS right-of-way permitting to improve Potomac Tennis Lane with a hammerhead turnaround, consistent with MCDOT standard MC-223.01 (Attachment 09). This improvement will fit within the existing right-of-way and provides a County recognized public road terminus that also is adequate for emergency vehicles.

Staff therefore proposed, and the Planning Board endorsed, a condition which would require the Applicant to construct the terminus of Potomac Tennis Lane with the modified hammer-head turnaround, as agreed. Technical Staff found that with that improvement, the access of the Site to Potomac Tennis Lane would be adequate to serve the use and any emergency response that may be required. Exhibit 61, p. 29. The Fire Marshal's office also reviewed the application and determined the on-site circulation and proposed building construction met the requirements of the Fire Marshal's office (Exhibit 61, Attachment 14).

The Hearing Examiner finds that with the called for improvement to the terminus of Potomac Tennis Lane, site access will be adequate.

2. Parking, Queuing and Loading

Conclusion: Parking, queuing and loading standards are governed by Division 6.2 of the Zoning Ordinance. For residential care facilities, the required number of vehicle parking spaces is based on the number of beds and the maximum number of employees on a shift. Zoning

Ordinance §59.6.2.4.B. The applicant must provide 0.25 spaces per bed and 0.50 spaces per employee. Based on 140 beds and a maximum of 40 employees, Technical Staff advises that the facility must have at least 55 vehicle spaces, two motorcycle spaces and four handicapped accessible spaces. Exhibit 61, pp. 12 and 20.

Technical Staff found that the Applicant meets or exceeds these requirements by providing 73 vehicle spaces, including 4 handicapped accessible spaces (2 of which are van accessible), 2 motorcycle spaces, and 10 bicycle spaces not required in Division 6.2. The vehicle parking spaces are located in two areas – a parking area in the front of the building, which will hold 55 vehicles and two motorcycles, and a garage on the ground floor under the building, which will hold an additional 18 vehicles and the bicycle parking. According to Technical Staff (Exhibit 61, p. 13), both parking facilities will meet the requirements of Section 59.6.2, including the requirements for Vehicle Parking Design Standards, Parking Lot Landscaping and Structured Parking Requirements. The vehicle parking spaces all measure 8.5 feet wide by 18 feet in length which is the minimum space size, and the drive isles measure 22 feet wide, two feet wider than the 20-foot minimum. At the far end of the surface parking lot, there are pavement wings that are designed to allow for fire and rescue vehicles to turn around and can also be used by personal vehicles to make a three-point turn.

Technical Staff also found that the application will meet the additional parking requirements for conditional uses in Residential Detached Zones (§59.6.2.5.K). Exhibit 61, p. 14. Staff observed that the surface parking lot is nearly 100 feet away from the right-of-way at the closest point, and there is ample landscaping and a four-foot tall stone wall that will be located between the parking lot and the right-of-way, sufficiently protecting the residential character of the street. In addition, the surface parking facility is set back over 60 feet from the

side yard, exceeding the 40-foot requirement that is imposed by the Zoning Ordinance.

Finally, Technical Staff found that the Applicant will be providing the required off-street loading space, in accordance with the loading standards set forth in Section 59.6.2.8. Exhibit 61, p. 14.

Based on this record, the Hearing Examiner finds that the Applicant's plans meet all the applicable parking and loading requirements specified in the Zoning Ordinance. There are no applicable queuing standards.

3. Site Landscaping and Screening

Conclusion: Division 6.4 of the Zoning Ordinance sets minimum standards for site landscaping, which are intended to “preserve property values, preserve and strengthen the character of communities, and improve water and air quality.” §59.6.4.1. Section 59.5.3.A.1. provides that *“Screening is required along a lot line shared with an abutting property that is vacant or improved with an agricultural or residential use.”* Technical Staff determined that because the property to the east and north of the Subject Property is used for a golf course, it is not subject to the screening requirements of Section 59.5.3; however, the properties to the south and west of the Site are improved with a one-family detached house and with an existing Residential Care Facility and are therefore subject to the screening section's requirements. Exhibit 61, p. 23.

The applicable screening requirements are included in §59.6.5.3.C.7. of the Zoning Ordinance. Conditional uses in the RE-2 Zone must meet one of two options set forth in that division. Both options require a particular number of shrubs and bushes for every one hundred feet. Option A permits landscaped buffers to be 8-feet wide with a 4-foot wall or fence and mandates the number trees and shrubs that must be planted within the 8-foot wide landscaped

strip. Option B does not require a fence, but the buffer must be 12 feet wide, and have a specified number of trees and shrubs for every 100 feet in length.

As noted by Technical Staff, the Applicant has chosen Option B which requires a planting area at least 12 feet wide that must include 2 canopy trees, 4 understory or evergreen trees, 8 large shrubs and 12 medium shrubs every 100 feet. The screening to be provided by the Applicant was discussed extensively and depicted in Part II.C.2. of this Report and Decision. Staff determination, also quoted there, is instructive (Exhibit 61, p. 15):

The Application exceeds the planting area minimum by providing for a 20 foot wide planting area between the Subject Property boundary and the private service alley. The Application meets the shrub density requirements and exceeds the canopy and understory/evergreen tree density requirement along the length of the screening area. In addition to plantings, the Application provides for a 6 Ft. 6 inch high privacy fence along the entire Site boundary with Manor Care to further screen views of any vehicles using the access alley including the glare of headlights. The screening proposed along both the southern and eastern property boundaries is wider and more robust than the existing screening on the Site and will greatly enhance neighborhood compatibility. The only portion of the Subject Property not actively landscaped is in the northwestern portion, which is to be replanted with native trees as a condition of the Forest Conservation Plan, and then placed in a Category 1 Conservation Easement. The landscaping proposed will adequately screen the Site from the neighboring properties and will provide for an inviting and active outdoor experience for residents and guests.

The Hearing Examiner accepts Staff's assessment, and finds that the proposed use meets the landscaping and screening standards required by Division 59-6.5 of the Zoning Ordinance.

4. Outdoor Lighting

Conclusion: The outdoor lighting proposed for the conditional use was discussed in Part II.C.2. of this Report and Decision. As indicated there, permissible lighting levels for a conditional use are specified in Zoning Ordinance §59.6.4.4.E., which provides,

Outdoor lighting for a conditional use must be directed, shielded, or screened to ensure that the illumination is 0.1 footcandles or less at any lot line that abuts a lot

with a detached house building type, not located in a Commercial/Residential or Employment zone.

The proposed fixtures must also meet the design requirements and fixture height limits specified in Zoning Ordinance §59.6.4.4.B.

The opposition has raised concerns about the visibility of the lights used by the proposed conditional use. However, the only fair way to assess planned lighting is to determine whether it will meet the very particular Zoning Ordinance standards for the lighting of conditional uses abutting a lot with a detached home, which are referenced above.

Technical Staff found that the proposed lighting will meet the specified design standards, and the proposed fixture mounting heights are all under the maximums allowed by the Zoning Ordinance. Exhibit 61, p. 22. Technical Staff's review of the photometric studies determined that the grounds will be adequately lit, but will not exceed statutory maximum levels at the lot lines:

. . . The Photometric Plan shows that all vehicle and pedestrian circulation areas as well as all outdoor amenity spaces will be lit. The lighting fixture details show that all the fixtures will be from LED's and all provide top shielding and internal refraction lenses to direct light downward away from the sky and neighboring uses . . . [Exhibit 61, p. 7]

The submitted photometric plan does not have a value of more than 0.1 foot-candles projected for any location along the property boundary. The only frontage applicable to this section based on surrounding uses is located to the west of the Site, and the maximum projected illumination at that property boundary is .06 foot-candles which meets the illumination requirements. [Exhibit 61, p. 23]

The Hearing Examiner's own inspection of the photometric plan (Exhibit 79(c)(iv)) reveals some readings along the western property line that exceed the ".06 foot-candles" measurement referenced by Technical Staff, but none that exceed the statutory standard of 0.1 foot-candles along the western property line.

There is no evidence in this record to refute Applicant's photometric study and Technical Staff's findings. Therefore, the Hearing Examiner finds that the proposed lighting for the conditional use will meet the Zoning Ordinance standards and will not cause undue harm to neighboring properties due to illumination.

5. Signage

Conclusion: The signage proposed by the Applicant was described and depicted in Part II.C. 2. of this Report and Decision. As stated there, "the Applicant proposes entry signage located on either side of the Site access which will be built into a concave curved masonry wall with five foot high columns and four foot high wall sections." The signs will be set into the wall section and will be lit with uplights and an integrated LED strip. Exhibit 61, p. 7.

Technical Staff concluded that the proposed signs are neither exempt under Zoning Ordinance §59.6.7.3., nor prohibited under Section 59.6.7.4. They also would meet the sign placement requirements of Section 59.6.7.6.B and the illumination requirements of Section 59.6.7.6.E. Finally, Staff concluded that "a Residential Care Facility (over 16 persons) meets the definition of a multi-unit development by being a general building with multiple resident suites within it," therefore allowing more sign area in a residential zone under Section 59.6.7.8.B.1. Exhibit 61, pp. 23-24. Applying that interpretation to the proposed signs, Staff found that they would comply with the maximum sign area of 40 square feet and would not violate any other provision.

The Hearing Examiner agrees with Technical Staff's interpretation of Section 59.6.7.8.B.1, applying it to this type of conditional use, because it would not be sensible to limit the entrance sign for this type of facility to a total of two square feet, which is the ordinary standard in a residential zone. There is no evidence in this record inconsistent with Technical

Staff's finds regarding the proposed signs, and the Hearing Examiner therefore finds that they comport with the applicable Zoning Ordinance standards for signs.

IV. Conclusion and Decision

As set forth above, the application meets all the standards for approval in Articles 59-3, 59-4, 59-6 and 59-7 of the Zoning Ordinance.

Based on the foregoing findings and conclusions and a thorough review of the entire record, the application of Brandywine Senior Living at Potomac, LLC (CU 16-01) for a conditional use under Section 59.3.3.2.E.2.c. of the Zoning Ordinance to build and operate a residential care facility for more than 16 persons at 10800 Potomac Tennis Lane, Potomac, Maryland, is hereby **GRANTED**, subject to the following conditions:

1. The Applicant shall be bound by the testimony of its witnesses and the representations of its counsel identified in this Report and Decision.
2. The proposed use is limited to a 140-bed Residential Care Facility. Individual suites are not permitted to have full kitchens.
3. Physical improvements to the Subject Property are limited to those shown on the Conditional Use Site Plan filed on December 22, 2015 (Exhibit 131 (a)), and the related Landscaping and Lighting Plan.
4. This approval is limited to no more than 40 employees on Site at any one time.
5. The Applicant must obtain a permit from the Department of Permitting Services (DPS) for any proposed entrance sign, if required to do so by DPS upon permit application, and to file a copy of any such sign permit with OZAH. The final design of the entrance signs must be in compliance with the Zoning Ordinance.
6. Prior to the receiving use and occupancy certificates, the Applicant must meet all applicable Federal, State and County certificate, licensure, and regulatory requirements.
7. Prior to receiving use and occupancy certificates, the Applicant must apply, pursuant to the procedures in the Zoning Ordinance, for revocation of the current special exceptions on the subject site, as abandoned.
8. The Applicant must construct the terminus of Potomac Tennis Lane according to Montgomery County Department of Transportation (MCDOT) Road Code Standard MC-223.01 – Temporary Turnaround, prior to the issuance of any building permit, as shown on the Conditional Use Plan. Any portion of the Temporary Turnaround that cannot be

accommodated within the public right-of-way must be placed in a Public Improvement Easement (PIE).

9. The Applicant must provide a car service and shuttle service for residents as detailed in the Addendum to its Statement in Support of the Application (Exhibit 39(c)), and a shuttle service for employees to the local bus stop or to Metro.
10. The Applicant must provide and install ten covered and secured bicycle parking spaces in the structured parking facility as specified on the Conditional Use Plan.
11. The Applicant must satisfy the Adequate Public Facilities – Transportation Policy Area Review (TPAR) test by making a TPAR payment equal to 25% of the applicable development impact tax, to the Montgomery County Department of Permitting Services at the time of building permit.
12. The Applicant must receive approval of a Final Forest Conservation Plan by the Montgomery County Planning Board prior to any land disturbing activities.
13. Regular hours of operation for the facility are 24 hours a day, 7 days a week; however, regular deliveries are limited to Monday through Friday, 8:30 a.m. to 5:00 p.m., and Saturday, 9:00 a.m. to 5:00 p.m., except in emergencies, and trash pick-ups are limited to Monday through Friday, 9:00 a.m. to 5:00 p.m., and Saturday, 9:00 a.m. to 4:00 p.m. Delivery vehicles and trash trucks are prohibited from using the access alley and truck turn around between the hours of 5:00 p.m. - 9:00 a.m.
14. Prior to issuance of a building permit, the Applicant must obtain all required stormwater management approvals from Montgomery County. If those approvals require modification to the conditional use plan, the Applicant must apply for an amendment to the conditional use plan.
15. The Applicant must operate this facility in accordance with all applicable County noise regulations, and if found in violation any such regulation, it must immediately take appropriate steps to ensure future compliance.
16. The Applicant must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the conditional use premises and operate the conditional use as granted herein. The Applicant shall at all times ensure that the conditional use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Issued this 21st day of March, 2016.



Martin L. Grossman
Hearing Examiner

NOTICE OF RIGHT TO REQUEST ORAL ARGUMENT

Any party of record or aggrieved party may file a written request to present oral argument before the Board of Appeals, in writing, within 10 days after the Office of Zoning and Administrative Hearings issues the Hearing Examiner's report and decision. Any party of record or aggrieved party may, no later than 5 days after a request for oral argument is filed, file a written opposition or request to participate in oral argument.

Contact information for the Board of Appeals is listed below, and additional procedures are specified in Zoning Ordinance §59.7.3.1.F.1.c.

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